Quarterly Report

of the

ATTORNEY GENERAL

of

ALABAMA

For The Period

From October 1, 1952

Through December 31, 1952

VOLUME 69

SI GARRETT, Attorney General

Attorney General:
Si Garrett

Assistant Attorneys General:
J. W. Arbuthnot
Lee Edward Barton
Thomas M. Galloway
Gordon Madison
William N. McQueen
M. Roland Nachman
William H. Sanders
Maury D. Smith
Robert Straub
Bernard F. Sykes

Assistant Attorney General assigned to the Department of Agriculture and Industries:
George O. Miller, Jr.

Assistant Attorney General assigned to the Department of Conservation:
A. J. Harris

Assistant Attorney General assigned to the Department of Examiner of Public Accounts:
James T. Hardin

Assistant Attorney General assigned to the Department of Finance:
Randolph G. Lurie

Assistant Attorney General assigned to the Department of Public Welfare:
Mary Lee

Assistant Attorneys General assigned to the Department of Revenue:
H. Grady Tiller
Willard W. Livingston
William H. Burton, Jr.

Confidential Secretary
Mrs. Dorothy G. Johnson

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TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from October 1, 1952 through December 31,, 1952. is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collecter, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

SI GARRETT,

Attorney General.

OPINIONS

October 2, 1952

Hon. Joseph R. Mitternight, Chairman

Mobile County Civil Defense Authority

107½ South Royal Street

Mobile, Alabama

Civil Defense — Counties — Merit System — Municipalities.

1. The Mobile County Civil Defense Authority has power to appoint paid employees in civil defense positions.

2. The five participating political subdivisions in Mobile County may act through the Mobile County Civil Defense Authority.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of July 24, 1952, is as follows:

"As Chairman of the Mobile County Civil Defense Authority, it is requested that you give to this organization your official opinion on the following points:

"(1) Referring to Act No. 14, Special Session 1951, General and Local Acts of 1951, page 180, section 9, **who is the Appointing Authority?**
"A copy of your opinion dated February 5, 1952 rendered to Honorable A. B. Jefferies, Chairman, Revenue and Road Commissioners of Mobile County, has been furnished this Authority. Pursuant to your opinion the Board of Revenue and Road Commissioners of Mobile County, together with the cities of Mobile, Pritchard, Chickasaw and Citronelle combined their efforts in order to form the Mobile County Civil Defense Authority. A copy of the resolution adopted by the Revenue and Road Commissioners of Mobile County is enclosed herewith for your information, which resolution was adopted April 22, 1952. The four cities mentioned above adopted similar resolutions. Each of the five political sub-divisions selected their representative to serve as members of the Mobile County Civil Defense Authority and each member thereof has taken the oath prescribed in Act No. 14 Special Session 1951 and the Authority is functioning. A temporary Director has been selected who is serving without pay and an Administrative Assistant with pay has been temporarily appointed. This Authority has contacted the Personnel Board of Mobile County in an effort to comply with Section 9(b) 2 of Act No. 14 and this Authority cannot classify the position and certify eligibles for appointment until they have been advised by the Attorney General as to who is the Appointing Authority. In other words, does the Mobile County Civil Defense Authority have the authority to appoint paid employees or must they be appointed by united action of the Board of Revenue and Road Commissioners of Mobile County together with the 4 cities?

"(2) Can the five political subdivisions located in Mobile County named above delegate the authority vested in each political subdivision to its representative as set out in the enclosed copy of the resolution of the Revenue and Road Commissioners of Mobile County, last paragraph on page one? As the Personnel Board of Mobile County has questioned the right of the Mobile County Civil Defense Authority or its Director to serve as the Appointing Authority for positions of employment in the classified service for its paid employees, this Authority feels that there should be a ruling from you on this point in order that it may know what its legal powers are."

In answer to your first inquiry, your attention is directed to Act No. 470, Local Acts 1939, page 298, which created and established a county wide civil service system for Mobile County. Section 1 of said act provides, in part, as follows:

". . . 'Appointing Authority', or 'Appointing Power' means a person, officer, board, commission, or other body or person whose lawful jurisdiction or powers are confined wholly or primarily within the territorial limits of Mobile County, or any incorporated city or town therein, and who or which have the power to make appointments to offices or positions of employment or trust in any of the Classified Services as in this act defined . . . "

Your attention is further directed to Act No. 14, General and Local Acts 1951, page 180. Section 9 of Act No. 14, supra, provides for the establishment of local civil defense organizations. It provides for the appointment by the political subdivision of a director "who shall have direct responsibility for the organization, administration and operation of such local organization for civil defense, subject to the direction and control of such governing body." Section 9, supra, further provides that the political subdivision has power and authority to employ personnel subject to any existing civil service or merit system.

The right of a particular board of a municipal corporation to employ persons may be expressly authorized by statute, or may be implied as a necessary incident to the carrying out of the duties imposed on it. 62 C.J.S., Municipal Corporations, Section 704, page 1428, citing **Bourland v. Coleman**, 60 S. W. 2d 1021, 187 Ark. 392. It is my judgment that the same reasoning would apply to county governing bodies. Therefore, it is my opinion that the "appointing authority" as contemplated in Act No. 14, supra, and Act No. 470, supra, is the Mobile County Civil Defense Authority.

In answer to your second inquiry, you are advised that the various political subdivisions may delegate the ministerial duties of civil defense to the Mobile County Civil Defense Authority. See **Hitchcock v. Galveston**, 96, U. S. 341, 24 L. Ed. 659. As was pointed out earlier, the director has full authority, subject to the direction and control of the governing body.

Therefore, although the various political subdivisions may delegate their ministerial powers to the Authority, the Authority is alway subject to the direction and control of the five participating political subdivisions.

Yours very truly,

SI GARRETT

Attorney General

October 2, 1952

Honorable W. G. Pruett

State Highway Director

State Highway Department

CAPITOL

Highways and Highway Department — Rights-of-way — Eminent Domain — Condemnation — Deeds.

1. Title to property passes under a deed on the day of its delivery. Title to property acquired by condemnation proceedings passes on the day payment therefor has been made, and, as against intervening rights, relates back to the filing of the petition for condemnation.

2. The owner of property over which an easement for a highway right-of-way has been obtained by the State, either by purchase or condemnation, may use that property, between the time of condemnation or purchase and the time of entry by the State, so long as it does not interfere with or encroach upon the use for which the easement was acquired.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of April 1, 1952, is as follows:

"The U. S. Bureau of Public Roads has raised a question concerning the legal date of taking right-of-way for public road purposes in Alabama. The question is raised on Project S-106(4) in Lamar County and copy of the letter from Bureau of Public Roads is attached.

"The rights-of-way for this partcular project were acquired by Lamar County during 1944 and 1945 as indicated on attached statement. Copies of two of the deeds are attached. The survey and plan work was started during 1940 and was about completed when the rights-of-way was acquired in 1944 and 1945.

"Structures were located within the limits of certain tracts of right-

of-way and the plans indicated that these structures would be moved by the State's contractor during the time the road was under construction. The removal of these structures was included in the first contract let by the State which was approved on October 10, 1949. Construction was started on October 18, 1949.

"Your opinion is requested on the following questions:

"1. What date is considered the legal date of taking of property acquired by deed or condemnation for a public road?

"2. What right has a property owner to use land acquired by deed or condemnation between the time deed is signed or condemnation completed and actual construction work begins."

To have effect as a conveyance of title to property, delivery of a deed is an indispensable requisite. **Pittman v. Pittman et al.**, 247 Ala. 458, 25 So. 2d 26. **Cook v. Whitehead et al.**, 255 Ala. 401, 51 So. 2d 886. In fact, title to property does not pass under a deed until delivery has been made. **Brown, et al. v. International Harvester Company**, 179 Ala. 563, 60 So. 841; **Bennett v. Albrecht**, 201 Ala. 445, 78 So. 823. This requisite to a complete conveyance of title must be satisfied regardless of when the deed is signed and acknowledged. **Brown, et al. v. International Harvester Company**, supra. And, in absence of proof to the contrary, the deed must be presumed to be delivered on the day of its date. **Carroll v. Carroll**, 236 Ala. 556, 183 So. 857.

In obtaining property by condemnation proceedings under eminent domain, payment therefor is a condition precedent to the vesting of title. **Rome & D. R. Company, et al. v. Sibert, et al.**, 97 Ala. 393, 12 So. 69. The compensation to be paid for land condemned must be fixed by valuation as of the date of the petition for condemnation. And, if the owner of property taken by eminent domain is compensated therefor, then all right and title vests in the condemner upon such payment, and, as against intervening rights, relates back to the filing of the petition for condemnation. **Smith v. Jeffcoat**, 196 Ala. 96, 71 So. 717.

Therefore, in answer to your question No. 1 it is my opinion (1) that a deed takes effect upon the day of its delivery, and, in the absence of proof, it must be presumed to have been delivered on the day of its date; (2) that in condemnation proceedings, title vests in the condemner on payment of the compensation and relates back to the filing for condemnation proceedings as against intervening rights.

In answer to your second inquiry, your attention is called to an opinion of this office found in Quarterly Report of Attorney General, Vol. 22, page 92, in which it was stated:

"The established rule of law in Alabama is that when the State procures a right-of-way for the purpose of a public highway, whether it be by dedication, purchase, or condemnation, the fee in the land remains in the owner of the land abutting on the road, subject only to such bur-

den or easement in favor of the public as were conferred by the act of dedication."

It is, therefore my opinion that the owner of the fee over which the State has acquired an easement, either by purchase or condemnation, for a State highway right-of-way may use that fee, between the time of purchase or condemnation and the time of entry by the State, in any way he may choose, so long as said use by the fee holder does not interfere with or encroach upon the use for which the easement was acquired.

Yours very truly,

SI GARRETT

Attorney General

October 9, 1952

Honorable Thomas A. Peavey,

Judge of Probate

Escambia County

Brewton, Alabama

Counties — Escambia County — Rights of Way — Claims — Highway and Highway Department.

1. In the sale of real estate to a county, if the seller believes he is selling one piece of property and the county thinks it is buying another piece of property, such a mistake, if honestly made, is a basis for a claim against the county.

2. Such claim may not be submitted to arbitration; however, it may be lawfully compromised.

3. Under the facts stated, such claim should not be settled by a deed conveying the land back to the seller.

4. Under the facts stated, the State Highway Department is not obligated to reimburse the county for payment of the claim. However, said department, if it so desires, may, under the provisions of Title 23, Section 25, Code of Alabama 1940, as amended by Act No. 283, General and Local Acts 1949, page 407, pay to the county any amount paid on said claim.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of August 14, 1952, is as follows:

"Re: Escambia County, Alabama

"(1) I, as Chairman of the Board of Escambia County, Ala., and said Board, do hereby request you to give us your ruling on the matters and things hereinafter referred to and composing a claim filed against said County by and for, and in favor of, Mr. G. T. Young, for the sum of about $3,500.00.

"(2) I, therefore, herewith enclose to you and annex to this letter a copy of said claim filed by said Young before said Board, and I also enclose to you a copy of Order No. 4, of said Board of August 11, 1952, authorizing me to call upon you for a ruling on said claim.

"(3) I will therefore thank you to pass upon and make and send me your ruling as to the law governing said County in the allowance and payment of said claim, and by kindly ruling on the different points named in said order of said Board of Revenue, being (a) to (k) in Sec. 5, and said points are specially referred to and made a part of this letter."

Attached to your request was the following order of the Board of Revenue of Escambia County, Alabama:

"Agreed and ordered by the Board of Revenue of Escambia County, Ala., on this the Second Monday and 11th day of August, 1952, as follows:

"(1) That now comes before the Board Mr. G. T. Young, and his attorney, Brooks Garrett, Esq., and presents to and files with said Board of Revenue his claim against the County for the very large sum of $3,500.00, Three Thousand Five Hundred Dollars, with verbal explanations and written explanations made in said verified claim.

"(2) As the Board understands it the claim is made against the County on the ground set forth in said claim and on the ground that damages to said amount is due by said County to said Young, on account of the County and its County Road Engineer acting for said County and for the State of Alabama in procuring right-of-way lands and right-of-way deeds satisfactory to the State from all land owners in said county whose lands abut the new State Road, — U. S. No. 31, — addition running South from the City of Brewton within said County, for about a mile, or more, for the betterment and widening and straightening said State Road and building a new State Bridge across Burnt Corn Creek within the city of Brewton, Ala., etc. That said Young and his wife was one of said abutting land owners and that all of said abutting land owners have signed right-of-way deeds covering the State Road right-of-way (made said deeds granting said right-of way to the county and delivering said deeds) and said county has fully paid for all of said right-of-way lands and the State of Alabama has heretofore reimbursed said Escambia County for the county money paid out for said right-of-way land deeds obtained by said county for the use and benefit of the State of Alabama.

"(3) That after some time elapsed and after all the foregoing was done, said Young claimed that he was offered about $5,000.00 for a lot of land described in the right-of-way deeds he and his wife made and delivered to said County and was a lot of land independent of the road bed of the State road and right-of-way and that this lot of land was about ..... feet long and about ..... feet wide and located outside of the right-of-way and was located, according to the contention of Young, in the forks of the old State Road and the new State Road, some distance South of Brewton, at a point where the new State Road right-of-way joins the old road bed and old right-of-way of said State Road and U. S. 31.

"(4) That Young claims that he did not know anything about it, — about this lot being described in the right-of-way deed until the purchaser offering to buy the land had the title examined and the examination showed that the County owned the land, as shown in said right-of-way deed which Young and his wife made to the County. All of the foregoing are a part of the claims and contentions made by said Young and wife. Some of which the county believes to be true and correct, but does not know for a certainty and will have to find out by careful investigation of all the facts.

"(5) That at the present time the Board cannot agree to any of the matters and things shown in said claim of said Young, and cannot now allow any part of the same or any of it and for the foregoing reasons said Board is compelled to refuse to allow said claim until approved by Attorney General.

"However, said Board desires to go into the matter fully, make full investigation and consider said claim with an attitude that is friendly to the allowance of said claim, provided the Attorney General of Alabama shall make a ruling on said claim showing that under the law said county may pay all or any part of said claim, or have said claim arbitrated, and thereafter pay the award of the arbitration, etc.

"Therefore:—

"(a) The Chairman and the Judge of Probate is therefore authorized and requested to present a copy of this resolution and a copy of said claim to the Attorney General of Alabama and request his ruling showing whether or not said County and this Board is authorized by law to pay all of said claim, or any part thereof, and especially request the Attorney General to rule on the following heads:—

"(b) Is said one of the claims authorized by law to be a claim chargeable against the County.

"(c) Can the County and said Board lawfully submit said claim to arbitration and when submitted can the county pay the award of the arbitrators.

"(d) Can said County lawfully compromise and settle said claim and

pay the amount of the compromise agreed on and is such claim one that may be lawfully compromised?

"(e) Can said county settle said claim by making a deed of conveyance to said Young and wife of said lot of land complained of by said Young and return it to Young in full settlement of his claim. Since the legal title is vested in said County? The Board understands that the State Highway Department is willing to this, but claims the Federal Government will not agree.

"(f) In the event, therefore, that said County pays out any money under the rulings of the Attorney General to said Young in settlement of said claim, then in that event is it lawful for the State of Alabama to reimburse Escambia County, Ala. for said money so paid out by said County to said Young?

"(g) The Board understands that the legal ground upon which said Young and his attorney, base their said claim against the County, is — based on the ground of mistake, — misunderstanding of the parties and that their minds did not agree, — each one thinking that the other fully understood everything agreed to and shown in the right-of-way deed signed by Young.

"(h) The belief of the Board is that all parties concerned made a mistake and that all parties did it honestly and in good faith in the whole transaction. Certainly Escambia County did not intend to overreach or defraud Mr. Young, since it was acting purely for the State and as a courtesy to the State. We, the Board, also believe that Mr. Young acted in good faith and did not know at the time that he was selling to the county any lot of land outside of the right-of-way, and the Board expects that a full investigation will show the foregoing belief to be the true facts in the case.

"(i) Otherwise, it would seem that the only basis of the claim would be misrepresentation and fraud on the part of the county and that by reason thereof the county had damaged Mr. Young. All of which cannot be possible and is not true and the Board does not understand that any such charge against the County is made by Mr. Young.

"(j) However, the Board understands that the Alabama Supreme Court has in every case of suit against the County for damages based on tort, misrepresentation and fraud, — whether done or committed by its agents or not, — that in all such cases the County is exempt from such suits and for the payment of damages for torts and of course this County would not undertake to settle or pay for any claim based on tort.

"(k) The county is proceeding on the idea that no such charges are made and that whatever was done was done honestly and in good faith by all the parties in the case and if a mistake was made it was an honest mistake made by all the parties.

"That said lot in question is a small triangular lot of land of three

sides, -- of 150 feet long on one side, — 300 feet long on one side and 400 feet long on remaining side."

I will answer your questions in the order in which you asked them.

(a) and (b). It has long been a rule in equity that a deed will be reformed or rescinded in a sale of real estate if one party believes he is buying a particular piece of property while the other thinks he is selling another piece of property. The courts hold in such instance there is no meeting of the minds and, hence, no contract. **Crosby v. Andrews,** 61 Fla. 554, 55 So. 57, **Peace River Phosphate Mining Company v. Thomas A. Green, Inc.,** 102 Fla. 370, 135 So. 328. **Glenn v. City of Birmingham,** 223 Ala. 501, 137 So. 292. It is my opinion that if the Escambia County Board of Revenue is satisfied that an honest mistake has been made and that the minds of the seller and buyer never met in regard to the amount of land to be conveyed, the board could legally pay all or part of the claim mentioned in the resolution of the board.

(c) In **Good Roads Machinery Company v. Henry County, Alabama,** 236 Fed. 730, it was held that courts of county commissioners had no authority to submit a claim to arbitration, their authority being limited to the allowance or rejection of a claim. Therefore, question (c) must be answered in the negative. It might be added that subsequent to the above decision, county governing bodies, under the provisions of Title 12, Section 12, Subdivision 10, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, have been given authority to compromise claims.

(d) All general laws governing the jurisdiction, power, authority, and duties of a court of county commissioners apply to the Board of Revenue of Escambia County. Act No. 231, Local Acts 1943, page 129. As pointed out in answer to question (c), county governing bodies have authority to compromise claims. Therefore, question (d) is answered in the affirmative.

(e) It is my opinion that the county could settle the claim by conveying to Young and wife the lot in question. However, you have supplied me with a letter from the Federal Works Agency stating that that agency would not approve the highway project if a reduction was made in the right of way already acquired. Thus, a deed from the county to Young would jeopardize the entire highway project inasmuch as federal funds are not available until the Federal Government has approved the project. Therefore, it does not seem that such action is advisable.

(f) Title 23, Section 25, Code of Alabama 1940, as amended by Act No. 283, General and Local Acts 1949, page 407, provides that the State of Alabama must reimburse the county for the cost of securing the right of way. However, the resolution of the Escambia County Board of Revenue dated November 12, 1951, attached to your inquiry, provides, in part, as follows:

"3. NOW, THEREFORE, be it resolved by the Escambia County Board of Revenue that upon payment of the sum of $7,125.00 by the State Highway Department to the County of Escambia, this Board will and hereby agrees to indemnify the State Highway Department and the Bureau of

Public Roads from all suits and claims that may be filed in the future by any person who may claim to have any right, title or interest in the land covered by the right-of-way on this Project and will take any action as may be deemed necessary to settle such suits and claims at its own expense."

In view of the agreement contained in the above resolution. it is my conclusion that the State Highway Department is not obligated to reimburse Escambia County for any amount paid by the county in settlement of the claim in question. However, it is my opinion that the State Highway Department, if it so desires, may, under the provisions of Section 25, as amended, supra, pay to Escambia County any amount paid on such claim.

Inasmuch as paragraphs (g), (h), (i), (j), and (k) do not pose questions, they require no answer.

Yours very truly,

SI GARRETT

Attorney General

October 10, 1952

Hon. Charles W. Terry

State Personnel Director

CAPITOL

Attorney General — Merit System — Securities.

Under the provisions of Title 55, Section 301, Code of Alabama 1940, as amended by Act No. 349, General Acts 1943, page 332, the Attorney General may appoint one confidential assistant in his capacity as Attorney General and another confidential assistant, to serve as an employee of the Securities Commission, in his capacity as Securities Commissioner.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of October 3, 1952, is as follows:

"Your letter of September 16, 1952, states that you are appointing a confidential assistant in your capacity as State Securities Commissioner, under the provisions of Title 55, Section 301 Code of Alabama (1940), as amended. The State Personnel Board has instructed me to obtain from you an official opinion on certain questions that occur to them in connection with such an appointment.

"May the provisions of Title 55, Section 301 be so construed that an elected or appointive official who serves in more than one capacity by

virtue of his office may appoint a separate confidential assistant or secretary in each of his capacities?

"Specifically, does the statute permit the Attorney General to appoint one confidential assistant in his capacity as Attorney General and another confidential assistant in his ex officio capacity as State Securities Commissioner, both of these appointments to be without regard to the provisions of the Merit System Act?"

Under the provisions of Title 55, Section 301, Code of Alabama 1940, as amended by Act No. 349, General Acts 1943, page 332, the Attorney General may appoint one confidential assistant in his capacity as Attorney General and another confidential assistant, to serve as an employee of the Securities Commission, in his capacity as Securities Commissioner.

The pertinent statutory provisions clearly dictate this conclusion. Pursuant to Title 53, Section 2, Code of Alabama 1940, the Attorney General of Alabama is Securities Commissioner. Section 2, supra indicates that the Attorney General, as Securities Commissioner, is given no mere pro forma functions. He is vested "with all the authority, rights, privileges, and immunities of such office, and shall make all reasonable rules and regulations as may be necessary to carry out the provisions of this title." Section 2, supra, also gives the Attorney General, as Securities Commissioner, power and authority to prosecute violations of the securities laws and to take necessary steps in connection with such prosecutions. Section 2 further provides that the office of the Commissioner shall be in the office of the Attorney General. The provisions of Title 53, Sections 1-27, Code of Alabama 1940, contain a detailed statutory scheme for the regulation of the registration and sale of securities in Alabama.

Section 301, as amended, supra, provides in part:

"The unclassified service shall include: One confidential assistant or secretary for each board, commission and elected officer and when requested by the Governor for each department head appointed by the Governor."

There is no doubt that the Securities Commission is a full-fledged "commission." Section 2, supra, makes is clear that the Attorney General is to be the Securities Commissioner with very definite duties and powers. Therefore, the Securities Commissioner, under Section 301, as amended, supra, is entitled to a confidential assistant or secretary. In this connection, see Quarterly Report of Attorney General, Vol. 31, page 84, which held that the State Highway Commission, consisting of one member, the Highway Director, was entitled to a confidential assistant or secretary under Section 301, as amended, supra.

The fact that the Attorney General, as an elected officer, is entitled to a confidential assistant or secretary in the performance of his duties as Attorney General of the State, does not prohibit the Securities Commission, as a board or commission, from having a confidential assistant or secretary merely because the Attorney General is Securities Commissioner. The con-

fidential assistant or secretary is given to the Commission, and certainly it is too clear for argument that the Securities Commission is a "commission" within the meaning of Section 301, as amended, supra.

Yours very truly,

SI GARRETT

Attorney General

October 21, 1952

Hon. J. T. McLaughlin, Mayor

City of Fairfield

Fairfield, Alabama

Alabama Alcoholic Beverage Control Board — Municipalities — Census — Taxation — Jefferson County.

1. The population of a municipality as determined by the decennial federal census shall be used as the basis for distribution to the municipality of (a) the license tax on cigarettes and tobacco levied by Act No. 414, General Acts 1947, page 304; (b) profits from Alabama liquor stores under Act No. 526, General and Local Acts 1951, page 915; (c) excise tax on beer levied by Act No. 662, General and Local Acts 1951, page 1132; and (d) excise tax on gasoline levied by Title 51, Section 657, Code of Alabama 1940, as amended by Act No. 20, General Acts 1943, page 20.

2. A special federal census may not be used to determine the population of a municipality for purposes of distribution to the municipality of funds derived from tax sources.
Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of August 22, 1952, is as follows:

"The City of Fairfield is an incorporated municipality located in the Bessemer Cut Off Division of Jefferson County, with a population according to the 1950 federal census of 13,177. On December 19, 1951, the city limits of the City of Fairfield were extended to include an area known as Forest Hills. This extension was accomplished by Act No. 399 Regular Session 1951, page 1537. The estimated population of the Forest Hills area is 2,000 persons, which population was not included in the 1950 federal census of the City of Fairfield because it was not at that time a part of the city.

"Distribution is made to the City of Fairfield at the present time on the basis of the 1950 federal census figure of the following named taxes:

"1. Cigarette and Tobacco Taxes. This tax levied and distributed in accordance with Title 62 Paragraph 330 (126) to 330 (138), Code of Alabama 1940, Revised.

"2. Profit Distribution from State A. B. C. Liquor Stores. This tax levied and distributed in accordance with Title 29 Paragraph 71 (1) Code of Alabama 1940, Revised.

"3. Excise Tax on Beer (Malt or Brewed Beverages). This tax levied and distributed in accordance with Title 62, Paragraph 330 (20a) to 330 (20m), Code of Alabama, 1940 Revised.

"4. State Shared Gasoline Tax. This tax levied and distributed in accordance with Title 51 Paragraph 657 of the Code of Alabama 1940, Revised.

"The federal census bureau in Washington has agreed to take a special federal census of the City of Fairfield under its present boundaries which include the Forest Hills area if the city will pay the expense. Attached is a letter from the federal census bureau dated August 4, 1952, marked exhibit "A". The City of Fairfield has agreed to pay the expenses of the special federal census.

"a. If this special federal census is taken, will distribution in the future be made to the City of Fairfield of the above named taxes on the basis of the population as shown by the special federal census, or will distribution continue to be made on the basis of the last regular federal census of 1950?

"b. If the above question is answered to the effect that distribution will continue to be made on the basis of the population of the last regular federal census of 1950, is there any legal means by which the City of Fairfield can receive distribution of the above named taxes on the basis of its present population which includes the Forest Hills area?"

As I interpret your inquiry, the questions on which you desire an official opinion are as follows:

1. May a special federal census of the City of Fairfield, which census would disclose an increase in the population figures as shown by the 1950 decennial census, be used as the basis for distribution of tax funds to the City of Fairfield from the following sources:

(a) License Tax on cigarettes and tobacco (Act No. 414, General Acts 1947, page 304);

(b) Profit from State A. B. C. Liquor Stores (Act No. 526, General and Local Acts 1951, page 915);

(c) Excise Tax on beer (Act No. 662, General and Local Acts 1951, page 1132);

(d) Excise tax on gasoline (Title 51, Section 657, Code of Alabama 1940, as amended by Act No. 20, General Acts 1943, page 20)?

2. If all of question No. 1, supra, is answered in the negative, is there any way that the city of Fairfield may receive distribution of the funds discussed in this question on the basis of its present population which includes the Forest Hills area?

In my opinion, Question No. 1(a) must be answered in the negative. Section 9 of Act No. 414, supra, provides as follows:

"Section 9. The license tax required to be paid by this act through the purchase of tobacco stamps from the Probate Judge shall be received by him and shall be distributed by him as follows: one-half of one percent of said tax first shall be paid to the Probate Judge to be paid by him to the General Treasury of the County for the collection and distribution of said tax, two and one-half percent of said tax shall then be paid to the license inspector for the enforcement of the provisions of this act and shall be paid by the license inspector to the General Treasurer of the County; the remainder of said tax, after first deducting the three percent as above provided shall be distributed as follows: one-fourth shall be paid into the General Treasury of the County and three fourths shall be distributed to the municipalities within the county on a population basis, according to the last or any subsequent Federal Census. The Probate Judge shall distribute the tax on or before the 10th day of the month following receipt of same."

It is to be noted that the above section states that the distribution of the municipalities' shares is to be made "on a population basis, according to the last or any subsequent Federal Census." If there were any doubt that the Legislature meant the decennial census, it was dissolved by the passage of Act No. 174, General and Local Acts 1951, page 415, amending Title 1, Section 14, Code of Alabama 1940, as follows:

"Section 14. Reclassification date.—The ninetieth day after the first day of the first regular legislative session held next after the publication by the federal government of the regular federal decennial population census for Alabama is hereby fixed as the date for any reclassification under any law requiring classification based on such said census. The provisions of the preceding sentence shall not apply to any law passed by the 1951 Regular Session of the Legislature of Alabama. The provisions of this section shall not apply to any law which provides for the levying or collection of license taxes on a population basis or the distribution of State and County collected or administered revenues or funds on a population basis; and the population as disclosed by any federal decennial census, as soon as the same is proclaimed, published or certified by the Director of the United States Census Bureau, shall be used in administering any such law."

Your attention is called to the fact that Section 14, as amended, supra, expressly provides that "the population as disclosed by any federal decennial census, as soon as the same is proclaimed, published or certified by the Director of the United States Census Bureau, shall be used in administering any such law," and Section 2 of the amending act provides, "That all

laws and parts of laws in conflict herewith be and the same are hereby expressly repealed." It is my opinion that if, in fact, it were permissible under Act No. 414, supra, to use a special federal census to determine population for the purpose of distribution of funds received from the license tax on cigarettes, it is no longer permissible by virtue of the enactment of Act No. 174, supra. Cf. Quarterly Report of Attorney General, Vol. 51, page 176.

It is my opinion that Question No. 1(b) must also be answered in the negative. Section 1(a) of Act No. 526, supra, providing for the distribution of the net profits of the Alabama liquor stores, is in part as follows:

". . . Populations shall be ascertained for the purposes of distribution under this act according to the last decennial federal census next preceding commencement of fiscal year for which distribution is to be made."

The last sentence of this section specifically states that the last decennial federal census shall be used to determine distribution of the net profits of the Alabama liquor stores.

Questions Nos. 1(c) and 1(d) must also be answered in the negative, for the same reason recited in the answer to Question No. 1(a).

In answer to Question No. 2, it is my opinion that Act No. 174, supra, controls, and that the answer thereto must also be in the negative. This act specifically provides that the decennial federal census is to be used as the basis for distribution to counties and municipalities of funds received from the four sources enumerated.

Yours very truly,

SI GARRETT

Attorney General

October 21, 1952

Honorable D. Hardy Riddle

Judge of Probate

Talladega County

Talladega, Alabama

Motor Vehicles — Licenses — License Tags — Opinions Overruled, Modified or Distinguished.

A "wrecker" (motor vehicle) used upon the highways of the State is subject to the license imposed by Title 51, Section 697, Code of Alabama 1940, and such vehicle cannot be licensed under the provisions of Act No. 315, General and Local Acts 1951, page 610 (Title 51, Section 693(1), Code of Alabama 1940).

Opinion reported in Quarterly Report of Attorney General, Vol. 22, page 202, overruled.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of September 16, 1952, is as follows:

"In the past this office has issued a truck license when presented with an application for a motor vehicle license for a 'wrecker.' I now understand that some counties have been issuing passenger car licenses for these vehicles based on a ruling from your office by the then attorney general Thomas S. Lawson and found in volume 22, page 202 under date of March 8th, 1941. Now we have the act (No. 315) of the 1951 Legislature providing for the three dollar license in which Section 1 reads 'Any other provision of law to the contrary notwithstanding, the license and registration fee on automobiles (the term "automobiles" shall include, but shall not be limited to Jeeps, station wagons, and other motor vehicles of similar construction) designed and used primarily for private passenger purposes and motorcycles shall be three dollars.'

"I would like to have from your office a ruling pointing out just what license to issue for 'wreckers' in view of the above ruling and the new law which says 'designed and used primarily for private passenger purposes.' By 'wreckers' we mean as defined in the above ruling and as commonly understood. Since this is a matter which will be vital to us by October 1st, may we have the ruling before that time if at all possible."

It is my opinion that the license prescribed by Act No. 315, General and Local Acts 1951, page 610 (Title 51, Section 393(1), 1951 Cumulative Pocket Part, Code of Alabama 1940), referred to as the "$3 tag," cannot be issued as a license for a "wrecker." The provisions of Act No. 315, supra, quoted in your request, are applicable only to automobiles "designed and used primarily for private passenger purposes and motorcycles." There can be no argument that a "wrecker," as commonly understood, is not designed and used primarily for private passenger purposes.

In view of the opinion of this office reported in Quarterly Report of Attorney General, Vol. 22, page 202, the question arises as to what is the proper license for a "wrecker" now that Act No. 315, supra, is in effect.

As was stated in the above referred to opinion it is a matter of common knowledge that motor vehicles commonly referred to as "wreckers" are used on the public highways. It was certainly not the intention of the Legislature in enacting Act No. 315, supra, to thereby exclude "wreckers" from all motor vehicle license requirements. The general scheme of license requirements for motor vehicles includes within its purview all motor vehicles which are used on the public highways of the State.

It is my considered judgment that the definition of a "motor truck" as

stated in Title 51, Section 692, Code of Alabama 1940, is sufficiently broad enough to include "wreckers" within its meaning, as that term is commonly understood, and that "wreckers" should be licensed in accordance with the schedule provided in Title 51, Section 697, Code of Alabama 1940.

In view of the above, the opinion reported in Quarterly Report of Attorney General, Vol. 22, page 202, insofar as the same conflicts with the conclusions stated herein, is overruled.

Yours very truly,

SI GARRETT

Attorney General

October 22, 1952

Hon. G. H. Wright, President

Board of Commissioners

City of Auburn

Auburn, Alabama

Housing Authority — Insurance — Municipalities.

A municipal housing authority may insure its buildings against fire and other hazards, and may award fire and extended coverage insurance to a mutual insurance company for such purpose, without violating Section 94, Constitution of Alabama 1901, provided the authority does not actually own stock in the mutual company and provided further that the liability of members of the mutual company for assessment is fixed and not unlimited. Such a policy is not voidable at the election of the insurer, and is not ultra vires the municipal corporation.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of September 4, 1952, is as follows:

"The undersigned President of the Board of Commissioners of the City of Auburn respectfully requests your opinion in reply to the inquiries stated hereinafter, which are founded upon the following statement of facts:

"The Housing Authority of the City of Auburn, Alabama, a public corporation organized and existing under the provisions of Title 25, Chapter 2, Sections 5-30, inclusive, of the Code of Alabama of 1940, as amended, and an agency of the City of Auburn, Alabama, a municipal corporation, has entered into an 'Annual Contributions Contract' with

the Public Housing Administration, an agency of the United States of America, which contract contains, among other things, the following provision in respect to the purchase of fire and other types of insurance upon improvements erected by the Authority.

"Section 305 .....

"Sub-Section 92 ..... (3)

"In connection with each policy, including renewals, for fire and extended coverage insurance and for owners', landlords' and tenants' public liability insurance the Local Authority shall give full opportunity for open and competitive bidding. The Local Authority shall give such publicity to advertisements for bids as will assure adequate competition and shall afford an opportunity to bid to all insurers who have indicated in writing to the Local Authority their desire to submit a bid and who are licensed to do business in the State. Such insurance shall be awarded to the lowest bidder. The lowest bid shall be determined upon the basis of net cost to the Local Authority. Net cost, for the purposes of this subsection (E), shall mean the gross deposit premium, plus the cost of insurance against the hazards, if any, of assessments, less any anticipated dividend based on the dividend payment and assessment record of the insurer for the previous ten years. Nothing in this subsection (E) shall have the effect of requiring the Local Authority to purchase insurance from any insurer not licensed to do business in the State or to purchase insurance which involves any hazard of assessment unless insurance against such hazard is available.

"The Authority has taken bids for insurance coverage and the lowest bid received from an insurance company qualified to do business in the State of Alabama was that of a 'mutual' insurance company, and under the provisions of the policy proposed to be issued, the Authority as assured and as policy holder would also become a stockholder in this company and entitled to receive dividends.

"My inquiries are these: Would such a policy of insurance be void as offending Section 94 of the Constitution of Alabama of 1901?
"Would such a policy be a contract voidable at the election of the insurer?

"Would such a policy be an ultra vires contract in so far as the assured is concerned?

"Is the quoted provision of the 'annual contributions' contract voidable at the election of the Authority, assuming the existence of a valid severability clause?

"Is the quoted provision of the 'annual contributions' contract void, as offensive to Section 94 of the Constitution of Alabama of 1901?"

With the qualifications set out below, you may award fire and extended

coverage insurance to a mutual insurance company for coverage of the housing authority described in your request.

I assume that the housing project is one which the Housing Authority of Auburn may erect and maintain pursuant to the provisions of Title 25, Section 5-30, Code of Alabama 1940. Under Title 25, Section 27, Code of Alabama 1940, the Authority may contract with the Federal Government in such manner as may be necessary to receive grants or borrow money from the Federal Government. Certainly a contract to insure the project against fire and other hazards is within the scope of this section.

I now come to the question of whether or not the Housing Authority may insure the project with any insurance company, mutual or otherwise, without violating Section 94, Constitution of Alabama 1901. Indications from the Supreme Court of Alabama on this point are strong enough to warrant a categorical statement that the Authority may insure this project without violating Section 94. See **Opinion of the Justices,** 249 Ala. 88, 30 So. 2d. 14. Since this opinion deals with group insurance for State employees, and holds that State and local governmental contributions to such insurance do not violate Section 94, supra (though voiding the statute on other grounds), **a fortiori** a governmental authority may expend funds to insure its buildings against fire and other hazards.

The next question is whether or not the Authority may take out insurance with a mutual insurance company. You have used the phrase, "become a stockholder in this company and entitled to receive dividends." As I shall point out, the mere fact that a member in a mutual insurance company is entitled to share in the profits of that company, does not make the member a "stockholder." Therefore, I think that your description of a member as a stockholder is inapt.

The Authority may purchase insurance in a mutual insurance company without violating Section 94, supra. Expenditures of funds for such a purpose is not a lending of credit or granting of public money or thing of value in aid of an individual, association, or corporation within the constitutional proscription. Nor does an authority become a stockholder in a corporation, association, or company. (Parenthetically, this contract is not **ultra vires** for the reasons set out below in support of the constitutionality of the contract.)

Alabama cases are silent on this subject. The courts of other jurisdictions, however, have upheld the right of a municipality or governmental body to insure its buildings in mutual insurance companies without violating State constitutional provisions against lending credit or becoming stockholders in private corporations or associations. (Texas is an exception to this general rule. **Lewis v. School District,** 139 Tex. 83, 161 S. W. 2d. 450.)

There are, however, certain caveats which must be pointed out. The liability of a member for assessment must be fixed and not unlimited. Various schemes fixing liability at a definite amount have been upheld. The most common feature is a cash premium payment with a contingent liability of a fixed maximum not to exceed some mathematical proportion

to the cash premium. See, e. g., **Clifton v. School District,** 192 Ark. 140, 90 S. W. 2d. 508; **Fuller v. Lockhart,** 209 N. C. 61, 182 S. E. 733. Of course, if there is no contingent liability whatsoever (see **Johnson v. School District,** 128 Ore. 9, 270 P. 764), there is no problem. However, most of the cases do not require that the policies be totally nonassessable in order to be valid, but merely require that the future contingent assessment or liability be fixed and determinate. See the leading case of **French v. City of Millville,** 66 N. J. L. 392, 49 A. 465, affirmed 67 N. J. L. 349, 51 A. 1109.

Other cases upholding the conclusions of this opinion that the Housing Authority may acquire insurance in a mutual insurance company are **Miller v. Johnson,** 4 Cal. 2d. 265, 48 P. 2d. 956; **McMahon v. Cooney,** 95 Mont. 138, 25 P. 2d. 131 (no liability for assessment in this case); **Macon v. Benson,** 175 Ga. 502, 166 S. E. 26; **Downing v. School District,** 297 Pa. 474, 147 A. 239. A collation of the cases and a discussion of them appear in 152 A. L. R. 495, 513.

These cases also make it clear that a right to share in a part of the profits of the business does not transform a member into a stockholder who actually owns a portion of the corporate property. See also 15 McQuillin, **Municipal Corporations,** 3rd Ed., Section 39.30, page 94:

> ". . . the fact that a municipality takes out insurance on its property by becoming a member of a mutual insurance company does not make it the owner of stock in a private company so as to violate the constitutional prohibitions."

And, see the general discussion of this subject in 1 Couch, **Cyclopedia of Insurance Law,** Section 236, page 493.

In the light of the above discussion indicating the allowability of purchasing insurance with a mutual insurance company, your question of whether or not the contract would be voidable at the election of the insurer seems unimportant. However, absent any contract provision or the existence of circumstances having no relation to the allowability of the purchase of mutual insurance company policies, the insurance contract may not be voided at the election of the insurer. This would probably be so even if it were unlawful for the governmental authority to purchase insurance in a mutual company; for the insurer would not be able to set up **ultra vires** after having accepted the benefits of the insurance contract. See **Southern Gas Co. v. Morgan** (Tex. Civ. App.), 299 S. W. 476; **Great American Indemnity Co. v. Blakey** (Tex. Civ. App.), 107 S. W. 2d. 1002, 1006. But, as pointed out, the question of **ultra vires** is not important here because a contract with the mutual insurance company would be proper.

In conclusion, you may accept the bid of the mutual insurance company for fire and extended coverage insurance on the housing project in question.

Yours very truly,

SI GARRETT

Attorney General

October 29, 1952

Hon. H. E. Lindsey,Chairman

Marion County Board of Revenue

Hamilton, Alabama

Taxation—Exemptions—Ad Valorem Taxes—Refunds.

A foreign corporation may not be granted exemption from county ad valorem taxes under Title 51, Section 3, Code of Alabama 1940, as amended by Act No. 199, General and Local Acts 1951, page 460, for any period extending beyond ten years from the date of being granted permission to do business in this state, or from the date of completion of the plant, industry, or factory of such foreign corporation, even though the benefits of a ten-year exemption properly granted were not realized.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of August 11, 1952, is as follows:

"On the 29th day of May, 1939 the Commissioner's Court of Marion County, Alabama extended a tax exemption to Thomas Alabama Kaolin Company, a Maryland corporation, for a period of ten years. The company overlooked claiming such exemptions in making its assessments in its taxes here at the tax office in Marion County, Alabama, until 1949. At that time discovery was made and for the first time such exemption was claimed.

"The Marion County Board of Revenue desires to give this company the full benefit of its ten year exemption which was heretofore granted it. In other words the Board desires to give this company a nine year tax exemption at this time rather than talk about refunding the nine years of taxes it paid to the county in the past.

"Please let me know whether or not the Board of Revenue can grant such a nine year tax exemption at this time to the Company."

It is my opinion that neither a nine-year exemption, nor any other period of exemption, can now be granted the Thomas Alabama Kaolin Company under the provisions of Title 51, Section 3, Code of Alabama 1940, as amended by Act No. 199, General and Local Acts 1951, page 460.

Section 3, as amended, supra, provides in part as follows:
". . . the court of county commissioners, or other court or board having like jurisdiction of any county, and the constituted authorities of any city or town in which it is proposed to locate, or add to, or to extend any such factories or plants, are authorized and empowered to

remit the taxes assessed for all county and municipal purposes, . . . for a period of not exceeding ten years from the date of the incorporation or organization of such plants, industries or factories, if incorporated and organized under the laws of the state of Alabama, or for a period not exceeding ten years from the date of being granted permission to do business in the state of Alabama, if a foreign corporation, or from the date of completion of such plant, industry or factory, or from the date of the completion of such addition or extension thereof . . ."

It is apparent from the above-quoted provision of Section 3, as amended, supra, that in the case of a foreign corporation, the exemption may be granted for a period of not exceeding ten years from the date of being granted permission to do business in this state, or from the date of completion of such plant, industry, or factory. From the facts as stated, it appears that the exemption was for the period October 1, 1939, through September 30, 1949, and that a tax lien attached on October 1, 1949, for the 1950 tax year. Similar tax liens have also attached on October 1 of each subsequent year. Since the maximum period of exemption authorized by statute expired in 1949, no further exemption may now be granted even though the benefits of the ten-year exemption granted were not realized.

With respect to a refund, I call your attention to Title 51, Section 328, Code of Alabama 1940. This section limits the refund of taxes paid through mistake or error to taxes paid two years prior to the application for such refund.

Very truly yours,

SI GARRETT

Attorney General

October 29, 1952

Hon. W. D. Kendrick, President

Commission of Jefferson County

Department of Finance

212 Court House

Birmingham 3, Alabama

Jefferson County—Traveling Expenses.

1. Expenses incurred by officers or employees of Jefferson County in connection with research, study, or promotion of matters pertaining to pending or prospective legislation affecting Jefferson County are payable under the provisions of Act No. 109, General and Local Acts of 1949, page 135, which require no itemization of the expenses so incurred.

2. Expenses, other than those pertaining to legislative study, research or promotion, incurred by officers or employees of Jefferson County, must be claimed and paid pursuant to the provisions of Title 12, Section 115, and Title 41, Sections 155 and 156, Code of Alabama 1940, which statutes require that such items of expense be itemized and sworn to by the claimant.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of August 29, 1951, is as follows:

"I would appreciate an official opinion with reference to Act No. 109, approved June 17, 1949, particularly as it applies to the following cases: "As an official of Jefferson County, I recently made an extensive survey of indigent care in several hospitals in various southeastern states. This survey was made in the interest of Jefferson County. The Examiner of Accounts insists that it will be necessary for me to itemize each expense incurred during this trip and present a statement or receipt of each expenditure.

"I would appreciate your opinion as to what is the proper procedure to follow to be reimbursed for expenses incurred as set out above."

In my opinion, the procedure and law governing reimbursement for the expenses above mentioned will be dependent upon the nature and purpose of the duties performed by you while incurring same.

Referring to the provisions of Title 62, Section 147, Code of Alabama 1940, pertaining to the power and authority of the County Commission of Jefferson County, I find that, among other things, the Commission is vested with the power and authority and charged with the duty "*** to examine, settle and allow accounts and claims charageable against the county, to examine and audit the accounts of all officers having the care, management, collecting, or disbursement of monies belonging to the county or appropriated for its use and benefit; to audit and allow all claims for charges and expenses for all county officers; * * *."

Referring to the provisions of Title 62, Section 148, Code of Alabama 1940, relative to the jurisdiction and power of such Commission, I find that:

"The Commission shall have all the jurisdiction and powers which are or may hereafter be by law vested in the courts of county commissioners or boards of revenue of this state and the members thereof shall perform all the duties and services and exercise all the powers which are, or may be provided by law for the members of courts of county commissioners or boards of revenue in this state."

It, therefore, appears that, unless otherwise provided by statute applicable to Jefferson County, the County Commission is vested with the same power and authority and charged with the same duties as are the governing

bodies of the other counties of the State operating under the general law pertinent thereto.

The general law pertaining to the presentation of and payment of claims for expenses incurred in official travel by county officers and employees is found in Title 41, Sections 155 and 156, Code of Alabama 1940, which sections are as follows:

> "It shall be unlawful for any officer or employee of any county, town or city in Alabama to be reimbursed from the treasury of any county, municipality or town expenses incurred by him while traveling or remaining beyond the limits of counties and municipalities in the performance of his duties incidental to the management or control of the affairs of such county or municipality unless said officer or employee presents and has approved as herein provided for an itemized statement of all expenses incurred.
>
> "When a county or municipality is governed by a commission form of government, such itemized statement shall be presented to the county or city comptroller or corresponding officer immediately upon the return of said officer or employee of such county or municipality and must be approved or disallowed at the next regular meeting of the city commission of such municipality. When a municipality is governed by a mayor and council, such itemized statement shall be presented to the treasurer of the city in similar manner as hereinabove provided for, and shall be approved or disallowed at the next meeting of the city council or county governing body."

It is further provided by Title 12, Section 115, Code of Alabama 1940, with reference to claims against the county in general, that:

> "No claim against the county shall be passed upon or allowed by the court of county commissioners unless it is itemized and sworn to by the claimant, or some person in his behalf having personal knowledge of the facts; * * *."

I am, therefore, of the opinion that, unless otherwise provided by law, claims for expenses incurred in official travel by county officers and employees must be presented in the form above prescribed, which includes itemization of such expenses. However, I find no requirement that such claims be supported by "a statement or receipt of each expenditure," it appearing that such itemization of expense, together with affidavit of the claimant as to the correctness thereof, is sufficient.

In your request for opinion you make reference to Act. No. 109, General and Local Acts of 1949, page 135, (Title 62, Section 143 (15), 1951 Cumulative Pocket Part, Code of Alabama 1940), and I find it necessary to consider the provisions of such Act in connection with your request. This Act provides as follows:

> "Each county in the State of Alabama having a population of 400,000 inhabitants or more according to the last or any subsequent Federal

census is hereby granted the same power which the largest municipal corporation in said county has at the time of the passage of this Act for the purpose of, making a study of, research with respect to and advise on pending or proposed legislation or to promote, encourage and pursue projects of interest and benefit to such county. Such county shall have authority to expend from the general funds of the county money for such purposes to the same extent to which the largest municipal corporation in the county may expend municipal funds for such purpose at the time of the passage of this Act. If any official or regular employee of such county is used for such purpose, such official or employee shall not be entitled to any additional compensation for any such services rendered but shall be entitled to actual expenses incurred. Any disbursements hereunder shall be made only upon presentation of a voucher sworn to by the person authorized to incur and who did incur such expense that it was incurred in connection with the duties herein above described; and the reference to this Act and a statement that said expense was incurred thereunder shall be sufficient, without further itemization."

It is significant to note that in codification the provisions of this Act are codified under the head "Legislative Research." Admittedly, the provisions of such Act are somewhat ambiguous and vague, and I feel it necessary that I seek to determine the true purpose and intent of the Legislature sought to be expressed in such Act.

As I construe such Act, it contains a grant of power to the county coextensive with that of the City of Birmingham for two separate and distinct purposes, with provision that county funds may be expended for each of such purposes, and that claims for expenses incurred thereunder need not be itemized. These purposes are, namely:

1. For the purpose of making a study of, research with respect to, and advise on pending or proposed legislation.

2. To promote, encourage, and pursue projects of interest and benefit to such county.

I am of the definite impression that by the enactment of Act No. 109, supra, the Legislature was seeking to grant to the county a power or authority not presently vested in the county, and, certainly, was not seeking to restrict any powers already held. With this premise in mind, the second purpose enumerated above becomes meaningless for the reason that the county governing body is already vested with power and authority equally as broad and extensive as that of the City with respect to the expenditure of funds in the promotion, encouragement, and pursuit of projects of interest and benefit to the county. Actually, no additional power was here granted to the county governing body, and hence I do not feel that the Legislature had in mind any other or different system or means by which the county was to incur expenses in this regard nor by which it was to reimburse its officers or agents for expenses incurred for such purpose.

The same is not true with regard to the first purpose above set out. A review of the decisions of our Supreme Court reveals that, in the field of legislative research and expenditure of public funds for the purpose of advising with the legislative body toward the procurement and passage of favorable legislation, the municipalities of the State have heretofore been vested with greater powers than have the counties thereof. In the case of **Stone, County Treasurer v. State ex rel Armbrecht,** 220 Ala. 437, 125 So. 653, it was held that the county governing body was not authorized to expend county funds for such purpose. On the other hand, in the case of **Fitts v. Commission of City of Birmingham,** 224 Ala. 600, 141 So. 354, it was held that the City of Birmingham is vested with the necessarily implied power to protect and promote its well-being before the State Legislature and to expend public funds therefor.

Based upon my construction of the provisions of Act. No. 109, supra, and in view of the opinions of the Supreme Court of the State above cited, I am of the opinion that it was the purpose and intent of the Legislature by the passage of Act No. 109, supra, to equalize and grant co--extensive power to Jefferson County and the City of Birmingham in this respect. In my judgment, such was the purpose of Act No. 109, supra, rather than any effort to completely nullify the necessity of any officer or employee of Jefferson County presenting itemized claims for expenses incurred while on official travel for the county.

Based upon such construction, it is my opinion that if the expenses incurred by you were incurred in connection with research, study or other activities associated with pending or proposed legislation affecting Jefferson County the same would be governed by the provisions of Act No. 109, supra, and no itemization would be necessary. If, however, such expenses were not so incurred in research, study, or activities relative to proposed or pending legislation affecting the county, but were incurred merely on official travel performed by you in connection with your duties as a member of the county commission, then, in my opinion, you should present your claim for reimbursement in the manner prescribed by Sections 155 and 156, supra.

Very truly yours,

SI GARRETT

Attorney General

JTH/wb

November 4, 1952

Hon. Gordon Persons, Governor of Alabama

President of Alabama Building Corporation

Capitol

Montgomery, Alabama

Insurance—Buildings.

Under the provisions of Act No. 477, General and Local Acts 1951, page 844, the Alabama Building Corporation has authority to carry rent insurance and pay premiums thereon with respect to buildings proposed to be constructed by the said corporation.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of October 27, 1952, is as follows:

"Alabama Building Corporation has been incorporated pursuant to the provisions of Act No. 477 adopted at the 1951 Regular Session of the Legislature of Alabama. The said corporation proposes to construct two state office buildings, to lease space in the said buildings to departments and agencies of the State of Alabama, and to finance the construction of the said buildings by the issuance of its bonds, all pursuant to the provisions of the said Act. The proposed bonds will be secured by a pledge of revenues from the said buildings, which revenues will consist of rentals to be paid to the corporation by the departments and agencies to which such space will be leased. Each of the proposed leases will provide for abatement of rental for any period during which the leased space may be rendered untenantable by reason of the occurrence of some casualty.

"The proposed bonds will be sold in reliance on the aforesaid pledge of rentals, so it will be necessary, in order for the corporation successfully to market the bonds, that it carry insurance of the type commonly known as "rent insurance." The corporation proposes to procure and carry such rent insurance with respect to each building providing, in the event such building is rendered wholly or partially untenantable by reason of fire, windstorm or other casualty, for payment by the insurer to the corporation of amounts equal to the amount of rental abated by reason of the untenantability of the building during the period required for restoration of the building but in no case exceeding a specified maximum period. The question has been raised whether the corporation has the power to carry and to pay premiums upon such insurance.

"Please let me know whether, in your opinion, Alabama Building Cor-

poration has the power to carry such rent insurance with respect to the buildings to be constructed by the corporation."

Act No. 477, General and Local Acts 1951, page 844, which authorizes the incorporation of the Alabama Building Corporation, defining its corporate powers, provides, in part, as follows:

"Section 6. Corporate Powers.—The corporation shall have the following powers: . . . . (5) to construct or erect . . . operate, insure, and maintain or to contract for the operation, insurance and maintenance of the building or buildings of the corporation, together with all the rights incidental to such construction, operation, and maintenance; (6) to borrow money, . . . and to issue (and do all things incidental to the issuance of) its bonds or other evidence of indebtedness; . . . ."

I am of the opinion that the power specifically granted to the corporation to insure or contract for the insurance of its buildings includes the power to procure the type of insurance known as "rent insurance" with respect to such buildings.

It is a matter of common knowledge that rent insurance of the type mentioned in your letter is a common form of insurance that is frequently carried by owners of property rented to tenants. Especially is that true where it is necessary to afford protection against the loss of rental income. It is a form of insurence that is frequently required by mortgagees. It is similar to ordinary property insurance in that the event upon the occurrence of which insurance proceeds become payable by the insurer is destruction of or damage to the building with respect to which the insurance is obtained. It is often provided for by a rider attached to the customary form of fire and extended coverage policy.

It seems clear, therefore, that rent insurance should be deemed to have been among the types of property insurance within the contemplation of the legislature in framing Act No. 477, supra, and that the term "insurance . . . . . of the building or buildings of the corporation" in the said act includes the type of insurance commonly known as "rent insurance" with respect to such buildings.

I am of the opinion, further, that even in the absence of specific grant of the power to insure the buildings, the power to obtain appropriate insurance, including rent insurance, would be included in the power to "operate . . . . the building or buildings . . . . together with all the rights incidental to such . . . . operation," and in the power "to issue (and do all things incidental to the issuance of) its bonds." The procurement of rent insurance is clearly incidental to the proper operation of such a building, as recognized by the universal accounting practice of charging the premiums for such insurance as an operating expense. You state that inasmuch as the purchasers of the bonds will rely on a pledge of the rentals from the buildings, it will be necessary that such insurance be obtained in order that the bonds may be marketed. The procurement of such insurance seems,

therefore, incidental to the issuance of the bonds, and hence within the powers granted to the corporation under the said act.

It is, of course, a well recognized principle of law that a corporation is entitled to exercise such powers as may be fairly regarded as incidental to the purposes for which it was created. **Alabama City G. & A. Ry. Co v. Kyle,** 202 Ala. 552, 81 So. 54; **Jackson Lumber Co. v. Trammell,** 199 Ala. 536, 74 So. 469; **Cunningham Hardware Co. v. Gama Transportation Co.,** 4 Ala. App. 561, 58 So. 740.

It should be noted that Section 1 of Act No. 477, supra, states, in effect, that the purpose of the act is to authorize the incorporation of a public corporation for the purpose of constructing a state office building or buildings, and to vest the corporation with all powers, authorities, rights, and privileges that may be necessary to enable it to accomplish its purpose, and expressly provides:

"This Act shall be liberally construed in comformity with the purpose expressed."

For the reasons set forth above, I am of the opinion that the Alabama Building Corporation has the power to procure rent insurance of the type referred to in your letter.

Yours very truly,

SI GARRETT

Attorney General

November 5, 1952

Hon. Ralph P. Eagerton,

Chief Examiner,

Department of Examiners of Public Accounts,

Montgomery 4, Alabama.

Taxation—Tax Assessor—Tax Collector—Exemptions—

Opinions Overruled, Modified or Distinguished.

1. The tax assessor in preparing the abstract required by Title 51, Section 65, Code of Alabama 1940, for the use of the tax collector in the collection of taxes due should include therein only those taxes actually due by the taxpayer and not those previously remitted or exempted by the county governing body under the authority of Title 51, Section 3, Code of Alabama 1940, as amended by Act No. 199, General and Local Acts 1951, page 460.

2. Quarterly Report of Attorney General, Volume 61, page 45,

overruled and withdrawn insofar as same conflicts with the opinion herein expressed.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of November 29, 1950, is as follows:

"With reference to your recent opinion, dated November 13, 1950, on 'Taxation—Tax Assessors—Tax Collectors—Exemption', it is respectfully requested that you further elaborate on the subject of industrial exemptions by giving an official opinion on the following:

"In the several counties wherein industrial exemptions are granted by the county governing bodies the procedure in the majority of the counties is that after the exemption has been granted by the county governing body, the taxpayer then assesses the property or industry, as the case may be, and at such time asserts his claim for the exemption. The Tax Assessor receives the assessment and computes the taxes thereon and enters on the Collector's abstract only that part of the taxes to be collected, that is, he omits from the abstract prepared for the Collector the amount of taxes that have been remitted, entering thereon only those taxes which the Collector will actually collect. This apparently is in line with the requirements of Section 41, Title 51, Code of Alabama 1940.

"In some few counties the Assessor lists on the abstract prepared for the collector the total amount of taxes as though there had been no exemption allowed. The Collector then has, of necessity, to determine the amounts of taxes remitted and those actual amounts to be collected. This information for the most part will necessarily come from the records in the Assessor's office as the Collector would have no other knowledge of the matter as the entire amounts of taxes including that part remitted would have been charged to him on the abstract prepared by the Assessor. The Collector would then request credit for that part of the taxes remitted and for which he is unable to collect in the same manner as request is made of the county governing body in asking for credits for errors, insolvents, etc. The Collector would not know whether the statutory requirements had been met as regards to proper time of claiming exemptions and proper time of assessing. These factors, it appears would have a very definite bearing on the allowance of an exemption. These facts the Assessor would readily know and would much more readily have the information at hand than the Collector for computing the amounts that should be remitted in following the dictates of the county governing body. The Assessor would also have the records to more readily determine when the period of exemption expired as the assessment for each year would readily reflect that a portion of the assessment had been exempted from taxation.

"1. In view of the fact that in the majority of counties the Assessor handles the computation of the taxes and amounts remitted as in cases of blind, insane, etc., and enters only the amounts to be actually collected by the Collector, would not this procedure be legal and proper under the laws governing the assessing of taxes and in the handling of industrial exemptions?

"Your opinion is respectfully requested on the above in order that we may properly and legally handle the matter from an audit standpoint during the course of our audits of the tax offices of the various counties."

Your request makes specific reference to the subject of industrial exemptions and the mode and manner of assessing property upon which such exemptions have been granted by the various county governing bodies of the State. The statutory authority for such exemptions is found in Title 51, Section 3, Code of Alabama 1940, as amended by Act No. 199, General and Local Acts 1951, page 460, which provides that in certain instances and for the purposes designated therein the county governing body is authorized and empowered to remit the taxes assessed for all county purposes, except school and school district taxes, on the property of the petitioner as specified. Title 51, Section 4, Code of Alabama 1940, sets forth the manner in which application for such exemption shall be made, providing that, if granted, such exemption shall be entered on the minutes of the governing body of the county.

With reference to the manner of assessing such property, even though exemption has been granted, I call your attention to the provisions of Title 51, Section 41, Code of Alabama 1940, as amended by Act No. 551, General and Local Acts 1951, page 965, which provides that the assessor, his deputy, or other officer, after administering the oath prescribed by Title 51, Section 40, Code of Alabama 1940, as amended by Act No. 551, supra,

"shall particularly inquire of the taxpayer as to the items of property and subjects of taxation owned by the taxpayer and for which he is liable to be taxed, and property exempt from taxation, which shall be listed by items, in order that he may elicit from the taxpayer a complete statement of the whole amount and specified items of property, and subjects of taxation with which he should be charged for purposes of assessment and taxation, and the same shall be entered upon the proper blank, and the tax assessor, his deputy or other officer administering the oath, shall require the taxpayer to give an estimate of the value of each item of personal property."

Said section further provides:

"Each taxpayer shall give to the assessor his occupation and post-office address. Provided that all property claimed exempt from taxation under the provisions of this title shall be listed with the tax assessor by the taxpayer and entered on his return showing the items of property sought to be exempted and provided further that no property

omitted from said return shall be exempted." (Emphasis supplied.)

The above statute relates to the tax return made by the taxpayer to the assessor as to all items of property owned by him, and includes not only that property subject to taxation but also that property upon which exemption has been allowed or may be rightfully claimed. It is clear that the assessor must make inquiry concerning each of such categories of property owned by the taxpayer and returned by him for assessment.

I next refer to the provision of Title 51, Section 55, Code of Alabama 1940, which states that the assessor shall, from the information furnished by the taxpayer on the tax return and from other information known to him or which he may procure, ascertain what, in his best judgment, is a fair and reasonable market value of each item of property returned by or listed to any taxpayer. Having so done said statute requires that the assessor "shall in separate columns, enter on such list such amount and value, and deduction for exemption to which such taxpayer is entitled." (Emphasis supplied.)

The above statute refers to the assessment lists prepared by the assessor and which, when alphabetically arranged and permanently bound, may be used in lieu of the book of assessments required by Title 51, Section 62, Code of Alabama 1940, except in those cases where a book of assessments is required by local law. Biennial Report of Attorney General 1934-1936, page 638. It is further provided by Section 62, supra, that in making the tax collector's abstracts, such abstracts shall be made direct from the assessment lists. It is, therefore, clear to me that in preparing the assessment lists the assessor must indicate thereon not only the amount and value of the property listed for taxation, but also deductions for any exemptions to which the taxpayer is entitled.

Turning next to the provisions of Title 51, Section 65, Code of Alabama 1940, I find it provided, in part, that:

"After the book of assessments has been completed as provided in this title, the tax assessor must enter in a book in concise form, the amount of taxes assessed against each taxpayer, showing separately the amount of taxes on real estate and personal property and other subjects of taxation, and the total amount of tax due, and the address of the taxpayer and the fees of the assessor with a blank for the fees of the collector, and such book he must turn over to the tax collector on or before the fifteenth day of September." (Emphasis supplied.)

The above statute relates to what is commonly known as the "collector's abstract" and is the subject of your instant inquiry. You inquire as to whether there should be included on such abstract as taxes due by the taxpayer those taxes previously remitted by the county governing body under the authority of Section 3, as amended, supra.

I am of the opinion that such taxes should not be so included.

It appears to me that the requirements of the above statute are clear

as to the information and matters to be included on the collector's abstract, that is, "the amount of taxes assessed against each taxpayer, showing separately the amount of taxes on real estate and personal property and other subjects of taxation and the total amount of tax due." (Emphasis supplied.)

I am of the opinion that, if a taxpayer has previously been granted an industrial exemption by the county governing body under the authority of Section 3, as amended, supra, and has properly claimed and presented proof of same to the assessor, the taxes so remitted are not "taxes due," and hence should not be abstracted to the collector for collection. It is my opinion and judgment that the purpose and intent of the collector's abstract is to furnish to the collector a condensed abstract or calculation of the taxes actually due by each taxpayer, and that it would defeat the purpose thereof to include thereon taxes which are not in fact due, but which in actuality have been previously exempted or remitted by the county governing body. In short, it is my opinion that only those taxes actually due by the taxpayer should be abstracted and forwarded to the collector for collection, and that those taxes previously exempted or remitted should not be included on such abstract as "taxes due."

The administrative difficulties of any other method of procedure have been pointed out by you in your request for opinion, hence I will not dwell at length on the same. Suffice it to say, that the collector would be afforded no means of accurately and efficiently ascertaining the amount of taxes actually due by the taxpayer should the abstract include taxes not in fact due. Furthermore, even should he be able to ascertain the actual taxes due he is afforded no means of being relieved of the collection of same other than by claiming an error in assessment, an insolvency, a litigation or some equally fictitious ground of relief, which is certainly not in keeping with the clear and well-defined procedure prescribed by statute.

In summary, I feel that when return is made by the taxpayer to the assessor he should make known to the assessor, by proper proof thereof, any prior remittance or exemption of taxes by the county governing body. Further, that same should be reflected in the records of the tax assessor and that the tax assessor should only abstract to the tax collector for collection those taxes actually due by the taxpayer.

It appearing that a contrary opinion was expressed in an opinion rendered you by my predecessor under date of November 13, 1950, Quarterly Report of Attorney General, Volume 61, page 45, such opinion, as it pertains to the question herein considered, is herewith overruled and withdrawn.

Yours very truly,

SI GARRETT

Attorney General

November 5, 1952

Hon. G. A. Mosley, Sheriff

Montgomery County

Montgomery 2, Alabama

Attachments—Sheriffs.

A sheriff may, when all the personal property within a place of business is attached, attach said property by temporarily locking the doors of the place of business.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion bearing date of May 16, 1952, is as follows:

"I am requesting an official opinion in regard to Attachments.

"Will you be kind enough to advise this office whether or not the sheriff is permitted to close a place of business and lock the doors, leaving the property on premises, under an ATTACHMENT.

The following statement will be found in 4 Am. Jur., Attachment and Garnishment, Section 542, page 881:

". . . . It has been held that goods in a building are sufficiently attached when an officer enters a building, publicly proclaims that he attaches all the property therein, locks up the building, and delivers the keys to the employee of the debtor, with directions, assented to by such employee, to keep the property for him."

In the case of In Re Bradley, 225 F. 307, a sheriff attached the personal property of the defendant, which was located on premises leased by defendant. The reason for attachment was the failure to pay the rent. The court had this to say:

"Without passing upon the right of the sheriff to permanently close premises upon which is situated personal property upon which he has levied, it seems reasonable that he should have the right to the temporary possession of the premises, long enough for him in the exercise of reasonable diligence to inventory and remove for storage the property levied upon . . . ."

In the case of Fleming et al. v. Moore, 213 Ala. 592, 105 So. 679, the court stated as follows:

". . . . An assertion by the officer that he levies or takes property by virtue of a writ in his possession, if the property is within his view and power to assert immediate dominion over it and, if necessary, take it into his custody, will be deemed an 'actual taking of it' under process. It should be said further that it is unnecessary that the property levied upon be removed by the officer. However, in all cases the act of the

officer must be such as to put the property out of the control of the debtor by the assumption of control by the officer and keep the same 'in his charge or in the charge of some one for him, and the officer is authorized to deputize some person or persons to control and keep the same for him as such officer. Inman, Smith and Co. v. Schloss, 122 Ala. 461, 469, 25 So. 739."

Therefore, in view of the above authorities, it is my opinion that a sheriff may, while in the process of attaching personal property temporarily, lock the premises on which the goods attached are located; said act of locking the premises by the sheriff being, in effect, a proclamation by him of his dominion and control over the attached goods.

Yours very truly,

SI GARRETT

Attorney General

November 6, 1952

Honorable James Douglas Brown

Mayor, City of Ozark

Ozark, Alabama

Municipalities—Licenses—Census.

1. The amount of a license tax levied on a business located within the police jurisdiction but not within the corporate limits of a municipality shall not be more than one-half the amount charged and collected as a license tax for a like business done within the corporate limits of the municipality.

2. A license tax levied within the police jurisdiction of a municipality must be levied pursuant to the exercise of police power and designed for regulating the business taxed, rather than for the purpose of collecting revenue.

3. A census taken by a municipality under the provisions of Title 37, Sections 481 and 482, Code of Alabama 1940, subsequent to a federal census, should be used in determining the extent of the police jurisdiction of a municipality.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion, bearing date of January 24, 1952, is as follows:

"On August 22, 1951, the boundaries of the City of Ozark were altered, rearranged and extended by an act of the Legislature. (See Act #522,

Local Acts of Alabama, Vol. Two, page 912, Regular Session, 1951) Land area map of Ozark enclosed.

"On September 19, 1951, the City Council of Ozark approved and adopted Ordinance #434 which fixed and prescribed a license tax for the sale, distribution or delivery of gasoline, kerosene or other liquid motor oil or fuel oil. A copy of said ordinance is enclosed herewith.

"Subsequent to the adoption of Ordinance #434 and the release of the 1950 Federal Census figures, by the Director of the United States Bureau of the Census, the City Government authorized a census enumeration of its inhabitants to determine the city's population as established after the effective date of boundary alterations and extensions authorized by Local Act of the 1951 Regular Session.

"Certain citizens engaged in the sale and distribution of petroleum products without the city limits but within the police jurisdiction, as established by said Ordinance #434, question the city government's authority to fix the police jurisdiction at three (3) miles from said corporate limits since the 1950 Federal Census was certified at less than 6,000 inhabitants.

"Your opinion is requested as to the validity of the ordinance:

"1. Imposing a license on the sale, distribution or delivery of gasoline, kerosene or other liquid motor or fuel oil within the police jurisdiction;

"2. Fixing the police jurisdiction as 'the territory outside the corporate limits of the City of Ozark lying within three miles from said corporate limits, and not within the corporate limits of any other municipality.'

"This request for your opinion has been duly authorized by the City Council of Ozark, Alabama."

I am of the opinion that the ordinance here under consideration, a copy of which you enclosed with your inquiry, as far as it pertains to the territory within the police jurisdiction and outside the corporate limits of the city of Ozark, is, in part, invalid.

Act No. 502, General Acts 1943, page 477 (Title 37, Section 733, 1951 Cumulative Pocket Part, Code of Alabama 1940), provides, in part, as follows:

"That any city or town within the State of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded . . . . ."

The pertinent parts of the ordinance here under consideration read as follows:

"Section 1. DEFINITIONS:—As used in this ordinance, ... the word 'DISTRIBUTOR' and the world 'SELLER' shall include any person who engages in distributing, delivering or selling gasoline and/or kerosene within the corporate limits or within the police jurisdiction of the City of Ozark. . . .

"Section 2. LEVY OF TAX IN THE CORPORATE LIMITS OF THE CITY:—In addition to all other taxes now imposed, every distributor or seller of gasoline and/or kerosene shall pay a license tax to the City of Ozark and a license tax is hereby fixed and levied in the amount of one cent (1c) on each and every gallon of gasoline and/or kerosene sold, distributed or delivered within the corporate limits of said City;

"Section 3. LEVY OF TAX IN POLICE JURISDICTION:—In addition to all other taxes now imposed, every distributor or seller of gasoline and/or kerosene shall pay a license tax to the City of Ozark and a license tax is hereby fixed and levied in the amount of one-half cent (½c) on each and every gallon of gasoline and/or kerosene sold, distributed or delivered within the police jurisdiction and outside the corporate limits of said City;

.....

"Section 7. PRIVILEGE LICENSES:—(a). In addition to the license tax herein fixed, each distributor of gasoline, kerosene, lubricating oil, fuel oil, or other motor or fuel oils shall pay an annual privilege license of $100.00 (b). In addition to the license tax herein fixed each filling station where gasoline, kerosene, fuel oil, lubricating oil, or any substitute therefor, is sold, whether principal business or not, shall pay an annual privilege license of $10.00 for the first pump, and $5.00 for each additional pump;

.....

"Section 9. SEVERABILITY:—Should any section or provision of this ordinance for any reason be held void or invalid, it shall not affect the validity of any other section or provision of this ordinance which is not of itself void or invalid."

Section 7 of the ordinance levies the same license fees within the police jurisdiction and outside the corporate limits as are levied within the corporate limits of the city of Ozark. This levy, as to the police jurisdiction, is definitely in violation of Act No. 502, supra, and is, therefore, invalid in this respect. However, inasmuch as the ordinance contains a severability clause (Section 9), the remaining sections of the ordinance will be considered.

Sections 2 and 3 of the ordinance levy a tax on certain businesses enumerated therein. It is my conclusion that Section 2 of the ordinance

is valid. It is my further conclusion that Section 3 of the ordinance (levying a tax in the police jurisdiction) does not violate Act No. 502, supra, as does Section 7.

In order for the tax levied by Section 3 of the ordinance to be valid, it must be levied pursuant to the exercise of the police power of the city and be designed for the purpose of regulating the business taxed, rather than for the purpose of collecting revenue. Quartely Report of Attorney General, Vol. 65, page 44; Vol. 61, page 28.

It is presumed that a tax levied in the police jurisdiction is levied as a valid exercise of the police power of a municipality (**Walden v. City of Montgomery,** 214 Ala. 409, 180 So. 231), and not as a source of revenue (**Alabama Power Co. v. City of Carbon Hill,** 234 Ala. 489, 175 So. 289). The action of the municipal body in fixing the amount of the tax will not be disturbed by the Court unless it appears there was a manifest abuse of that power. **City of Andalusia v. Fletcher,** 240 Ala. 110, 198 So. 64.

In reliance on the presumption that Section 3 of the ordinance was effectuated as an exercise of the police power, it is my opinion that such section is valid insofar as it pertains to that territory within the police jurisdiction of the city of Ozark.

Title 37, Section 9, Code of Alabama 1940, provides:

"§ 9. Police jurisdiction; territorial.—The police jurisdiction in cities having six thousand or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than six thousand inhabitants, and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and half of the corporate limits of such city or town . . . . "

Title 37, Section 5, Code of Alabama 1940, provides, in part, as follows: "§ 5. Municipalities classified into cities and towns.— . . . . The last census, whether federal or taken as herein authorized, shall be taken in determining the population of a city or town. . . . . "

Title 37, Section 481, Code of Alabama 1940, authorizes a municipality to take a census. Title 37, Section 482, Code of Alabama 1940, relating to such census, provides, as follows:

"§ 482. Alphabetical arrangement of census.— Such enumeration shall be alphabetically arranged and returned to the mayor, together with the original books of enumeration. The mayor shall thereupon certify to the secretary of state the result of such census, giving the total number of each race residing within the corporate limits of the municipality, and the result so certified by the mayor under the seal of the municipality, attested by the clerk, shall be the official census of such city or town until the next federal census or until a new enumeration shall have been taken . . . . "

The effective date of the 1950 Federal Census will not here be dis-

cussed, as, under the provisions of Section 5, supra, the last census taken, whether federal or as authorized by Sections 481 or 482, supra, is the census which determines the population of a city for purposes here under consideration. Your inquiry affirmatively states that the census taken by the city of Ozark was subsequent to the 1950 Federal Census; therefore, such census should be used in determining the extent of the police jurisdiction of the city of Ozark.

According to your letter of January 23, 1952, attached to your request, the census taken by the city of Ozark shows the population to be 7,687. Assuming that all the provisions of Sections 481 and 482, supra, have been complied with, it is my conclusion that the police jurisdiction of the city of Ozark is correctly defined in Secton 1 of the ordinance to mean "the territory outside the corporate limits of the city of Ozark lying within three miles from said corporate limits, and not within the corporate limits of any other municipality."

Yours very truly,

SI GARRETT

Attorney General

November 17, 1952

Hon. W. G. Pruett, Director

State Highway Department

CAPITOL

Merit System—Employers and Employees—Salaries.

1. The Personnel Department has authority to prescribe reasonable rules and regulations concerning the items enumerated in Title 55, Section 300, Code of Alabama 1940.

2. When a department of the State of Alabama has authority to prescribe rules and regulations, and those rules and regulations have been adhered to for a number of years and are not unreasonable, arbitrary, or capricious, said rules should be complied with.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of August 26, 1952, is as follows:

"Under certain rules of the State Personnel Board, this Department is required to adhere to stipulated methods in the calculation of pay of employees for time earned in regular work and as to annual leave upon termination of services of an employee in good standing before the payroll will be certified for payment by the Personnel Director.

"One rule requires that upon resignation, the date of such action is to become effective as of the date of the employee's last working day, thereby terminating his pay as of that same date.

"Title 55, Section 302, of the 1940 Code, states, 'A thirty day month shall be used for the purpose of calculating the pay of employee COMPENSATED ON A MONTHLY BASIS.'

"To adhere to the rule as set out above in paragraph 2, would seem discriminatory in that an employee would be required to forfeit one or two days pay when the last one or two days of a pay period fall on Saturday and/or Sunday simply because he is resigning although he worked the same length of time as other employees not resigning and who receive full pay. It would seem further that calculation for payment on the basis of the rule would be inconsistent with Title 55, Section 302, quoted above for if an employee works the entire workable time of a pay period he is entitled to be compensated for the full pay period.

"Question: If upon the termination of the services of an employee who has fulfilled all of his working time and/or duties for an entire period and the last day and/or last two days of a pay period fall on a Saturday and/or Sunday, is it mandatory on the Highway Director to pay and the Personnel Director to certify the salary of the employee for the full payroll period?

"Rule XI, Section 2, relating to Leaves of Absence states, 'Employees in permanent positions including provisional employees, shall be entitled to annual leave with pay, at the rate of one working day for each calendar month of service . . . . . Persons who resign in good standing may be paid for the actual number of working days accrued, but not for Sundays, holidays, or other non-work days coming after actual separation from the job.'

"Here again it would seem that we have a rule that discriminates against an employee resulting from his resignation since employees in current service not resigning are allowed and paid for working days accrued for vacation plus intervening Saturdays and Sundays. Further, it would seem that the rule quoted above is inconsistent within itself as it entitled an employee to accumulate working days leave then at the same time does not allow him to take them as such.

"Question: When vacation pay is authorized for an employee resigning, is it mandatory on the Highway Director to pay and the Personnel Director to certify payment of salary for accrued working days vacation plus intervening Saturdays, Sundays, and holidays?"

In my opinion, both of your questions should be answered in the negative.

It is clear that the Personnel Department may promulgate rules and regulations as prescribed by Title 55, Section 300, Code of Alabama 1940. This section provides in part as follows:

" . . . . Among other things, such rules shall provide for the method of administering the classification plan and the pay plan; the establishment, maintenance, consolidation, and cancellation of lists; the application of service ratings; the hours of work, attendance regulation, and leaves of absence for employees in the state service; and the order and manner in which lay-offs shall be effected. Such rules may include any provisions relating to state employment, not inconsistent with the laws of the state, which may be necessary or appropriate to give effect to the provisions and purposes of this chapter. The powers herein conferred upon the director shall be subject only to the provisions of this chapter and of the rules adopted hereunder, and may be exercised by regulation or by order as the director sees fit."

It appears to me that if an employee of the State of Alabama resigns his employment on a Friday, it cannot be said that such employee is an employee of the State of Alabama on Saturday and Sunday following; and it is logical and reasonable that the pay of such employee should not include those two days during which he is not in the status of an employee, although had the same employee not resigned his pay would have included both Saturday and Sunday.

It is also reasonable and logical to me that when an employee of the State of Alabama resigns, having earned accrued annual leave, he should be paid for the actual number of days of said accrued annual leave, not including Saturdays, Sundays, and holidays which may intervene.

Since the Personnel Department, under the provisions of Section 300, supra, has the power and authority to make rules and regulations concerning these matters, it is my opinion that the method of calculation of pay formulated by the Personnel Department should be adhered to. After a careful study of this method, I cannot say that the method is unreasonable or arbitrary or capricious.

Since the Personnel Department, therefore, has the power to make such rules and regulations, and since such rules and regulations have long been adhered to, and in my opinion are not unreasonable, it is my conclusion that your questions must be answered in the negative.

Yours very truly,

SI GARRETT

Attorney General

November 17, 1952

Hon. J. A. Williams

Register, Circuit Court

Chambers County

LaFayette, Alabama

Absentee Ballots—Registers—Elections—Compensation.

The register of the circuit court, or the person acting in his

stead, in handling absentee ballots and in performing his duties in having a list of absentee voters prepared and furnished to election officials under Act No. 424, General and Local Acts 1949, page 601, as amended by Act No. 921, General and Local Acts 1951, page 1570, is not entitled to reimbursement in addition to the compensation of ten dollars per day provided in Section 17 of Act No. 424, as amended, supra.
Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of November 4, 1952, is as follows:

"Section 16 of Act No. 424, General Acts of Alabama, 1949, provides that the register shall, before the polls open at any election, cause to be delivered to the election officials of each polling place a list showing the name and address of every person whose name appears on the official list of qualified electors for such polling place who voted an absentee ballot in the election. . .

"Section 19 of the same act reads as follows: 'All necessary and proper expenses and costs incurred in the carrying out of the provisions of this act, for which no special provision is made herein, shall be paid for in the same manner as are necessary costs and expenses incurred in the several classes of elections enumerated hereunder.'

"Please give me your official opinion as to whether or not the register may be reimbursed under Section 19, referred to above, for necessary expenses and costs incurred in causing to be delivered to the election officials of each polling place in Chambers County a list showing the name and address of every person whose name appears on the official list of qualified electors for such polling place who voted an absentee ballot in the election, as provided by Section 16 of the act referred to and mentioned hereinabove, and I should like, also, to know what steps to take in order to obtain these necessary and proper expenses incurred."

I am of the opinion that your inquiry must be answered in the negative.

The register of the circuit court has various duties which he must perform in handling absentee ballots as required by Act No. 424, General and Local Acts 1949, page 601, as amended by Act No. 921, General and Local Acts 1951, page 1570. Among the duties and services of the register under Act No. 424, supra, is the furnishing of a list to the election officers at each polling place, showing the names and addresses of all persons who voted an absentee ballot (Section 16). This, of course, must be done in order that the election officials may strike the name of that person from the poll list so that there will be no possibility of a second ballot.

Section 17 of Act No. 424, as amended, supra, provides in part as follows:

"For his services under this Act during the twenty days prior to each election to which this act pertains and for his services on the day of the election, the register, or person acting in his stead, shall be paid the sum of ten dollars ($10) daily. Such payment shall be made from the county treasury, except in the case of a municipal election held at a time different from a primary or general election, in which event payment shall be from the city or town treasury . . . . "

In construing Section 17, supra, it has been held that all registers, whether on a salary or not, are entitled to receive the compensation provided for. **Kendrick v. Boyd**, 35 Ala. App. 592, 51 So. 2d 697; **Kendrick v. Boyd**, 255 Ala. 422, 51 So. 2d 701. Furthermore, this office has held that when two elections are held on the same day, the register, or the person acting in his stead, receives the sum of ten dollars per day in respect to each election held on that day. Quarterly Report of Attorney General, Vol. 65, page 14.

Section 19 of Act No. 424, supra, provides for the payment of all necessary and proper expenses for carrying out the provisions of said act, when no special provision has been made in the act for the payment of such expenses. No doubt, in preparing lists of persons who have voted an absentee ballot, which list must be furnished to the election officials at the polling places, the register must perform some clerical duties and may find it necessary to employ a typist. It is my opinion, however, that the register's duties in preparing the list and furnishing the list to the election officials, are part of those services intended to be compensated for specifically by Section 17, as amended, supra. It is immaterial, therefore, whether the register himself prepares the list to be furnished to election officials or whether the register employs a typist. The compensation specifically allowed to the register for his services by the terms of Section 17, as amended, supra, is meant to compensate the register for all of his services performed under the provisions of Act No. 424, as amended, supra, including the preparation of said list.

Yours very truly,

SI GARRETT

Attorney General

November 18, 1952

Hon. W. H. Nicol

Commissioner of Finance

City of Tuscaloosa

Tuscaloosa, Alabama

Colleges and Universities—University of Alabama—

Taxation Sales Tax.

Sales of tangible personal property at retail made by the Uni-

versity of Alabama, through the University Supply Store, to the general public as well as students, unless expressly exempted, are subject to the sales tax levied by the city of Tuscaloosa, and the University is authorized and required to collect such tax. Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion, bearing date of October 20, 1952, is as follows:

"Enclosed herewith is a copy of Ordinance No. 1163 adopted by the City of Tuscaloosa, imposing a sales tax within the city similar to the State Sales Tax. The University of Alabama operates on the campus, within the city, a store commonly known as the University Supply Store, for the sale to the public as well as to students of books, stationery, toilet articles, soft drinks, athletic goods and other merchandise. The store is located in a University building and is entirely owned and operated by the University. The profits of the store are put to the credit of the Student Welfare Fund and expended by the University as one of its funds.

"Assuming the validity of the ordinance as it applies to merchants of the city, your official opinion is requested by the City of Tuscaloosa in answer to the question: Is the University Supply Store required or authorized to collect the tax and pay it to the city as is done by privately owned stores in the city?"

The Legislature of Alabama is prohibited by Section 91 of the Constitution of Alabama 1901 from taxing "the property, real or personal, of the state, counties, or other municipal corporations." It could not, therefore, grant to a city a right which it does not have itself.

This constitutional provision, however, applies only to ad valorem taxes. **City of Birmingham v. State**, 233 Ala. 138, 170 So. 64. **State v. City of Montgomery**, 288 Ala. 93, 151 So. 856, **County Board of Education v. State**, 237 Ala. 434, 187 So. 414. **Brooks v. City of Birmingham**, 248 Ala. 227, 27 So. 2d 249.

As a general rule, state property is immune from taxation by a city or by the federal government, but it has been held that the immunity exists only for activities which are strictly governmental. It does not extend to those activities used by the state in carrying on an ordinary private business. **South Carolina v. United States**, 199 U. S. 437, 50 L. Ed. 261, **Allen v. Regents of University System of Georgia**, 304 U. S. 439, 82 L. Ed. 1448.

That there is no immunity or exemption from taxes, is adhered to with more and more strictness unless the tax substantially interferes with governmental functions. **In Re Leavy** 85 Fed. 2d 25.

There can be no question but that the University of Alabama is a "public municipal corporation" and a part of the State of Alabama. **Cox v. Board of Trustees**, 161 Ala. 639, 49 So. 314.

Here the University of Alabama, an educational institution is operating a supply store for profit and selling not only to the students at the University, but also to the general public as well. It is in direct competition with merchants of the city. It is not necessary to say here whether it can lawfully operate such a store (see 55 Am. Jur., Universities and Colleges, page 7, Section 10), for in so doing it cannot be doubted that the operation has many incidents of an ordinary private business.

In the main, the ordinance of the city of Tuscaloosa parallels the state sales tax, and provides that the taxpayer's liability shall be an amount equal to one-third of the amount paid to the state under state law.

The sales tax here under consideration is not a property tax on the University, but is a consumer's tax. While theoretically the tax is on the seller, yet in actuality the burden of the tax falls on the consumer. **Long v. Roberts**, 234 Ala. 570, 176 So. 213. **Lone Star Cement Corporation v. State Tax Commission**, 234 Ala. 465, 175 So. 399.

Under Section 4 of the ordinance, all those certain exemptions provided by state law, as exemptions from state sales tax and state use tax, are adopted and made applicable as exemptions from the city sales tax.

Under Title 51, Section 755(b), Code of Alabama 1940, as amended by Act No. 211, General and Local Acts 1949, page 302, gross proceeds of sales of tangible personal property to the State of Alabama, the counties, and the incorporated municipalities in the state are exempted.

It is to be here noted that there is no exemption of all tangible personal property sold by the State of Alabama, the counties, or incorporated municipalities. Said Section 755(b) and (d), as amended, supra, does provide for the exemption of the gross proceeds of sales of athletic equipment for the sole use and benefit of, and under the control of, public, state, county or city schools within the State of Alabama, and the gross proceeds of the sales of text books used in elementary schools, high schools, and institutions of higher learning.

Under Regulation G27-031 issued by the Department of Revenue, meals sold by schools, colleges, or universities, private or public, have been declared subject to the state sales tax, excepting school lunches exempted under said Section 755(n), as amended, supra. Likewise, under Regulation G27-032, state, county, city, and privately owned institutions are required to report and pay sales taxes on sales of school supplies, other than those which are exempt, and on any other sales made as a regular course of business. Under Regulation G27-021, it is pointed out that although sales to state, county, or city owned and operated schools, colleges, and universities are exempted from the sales tax on property purchased by them, such institutions are not exempted from or immune to the provisions of the sales tax law which require every seller to collect and remit to the state the tax levied.

Under the bracket system for the collection of the tax provided by Title 51, Section 776, Code of Alabama 1940, as amended by Act No. 525,

General and Local Acts 1951, page 914, no tax is to be collected on one cent to and including ten cents of sales price. To this extent, it may be said that the tax is on the vendor rather than the consumer. But the bracket system is so designed that where a vendor makes sales greater than ten cents he will, on his total sales, collect no less than the 1% required under the ordinance. In reality, this is also passed on to the consumer, and experience has demonstrated that the tax required to be exacted, though regulated to avoid fractions of cents, may even afford slight profit. **Jewel Tea Company v. State Tax Commission**, 293 N. W. 386. **State v. Woods**, 242 Ala. 184, 5 So. 2d 732. Quarterly Report of Attorney General, Vol. 64, page 72.

In addition, the ordinance allows the vendor a discount equal to 5% of the first one hundred dollars of each monthly installment and 2% of each monthly installment over one hundred dollars. So, viewing the sales tax required by the ordinance in a practical manner, its imposition does not substantially interfere with the governmental functions of the University. In reality, the University, its agents or employees, are merely tax collectors for the benefit of the city of Tuscaloosa. Quarterly Report of Attorney General, Vol. 64, page 72.

In the case of **In Re Leavy**, supra, under a municipal law which imposed a sales tax on the buyer and made the seller liable for the collection thereof, a trustee in bankruptcy was held liable for the tax on a sale at auction of the bankrupt's stock and fixtures. The court there said:

> ". . . . We cannot see that the collection would have required steps on his part that would in any fair sense have interfered with the discharge of his functions. It can hardly be imagined that a tax on goods purchased from the army or navy or any other government department would be regarded as an unlawful impediment to the exercise of a government function. Yet there, as here, if the goods were to be tax free in the hands of the purchaser, the seller would have been likely to get a better price than if they were to be subject to a tax. Indeed, an exemption would probably result in a gain by vendors in their receipts from sales that would be measured by the amount of taxes that purchasers would ordinarily have to pay. If taxes on purchases at ordinary government sales are not unlawful, it is hard to see why taxes on purchases at judicial sales should stand in a different category. It must be remembered that property in the hands of a trustee is ordinarily subject to the same state and municipal taxes to which other property in the locality is subject, (Swarts v. Hammer) 194 U. S. 441, 24 S. Ct. 695, 48 L. Ed. 1060, and that trustees and receivers, if continuing the business of insolvent corporations, are liable for corporate franchise taxes. Michigan v. Michigan Trust Co., 286 U. S. 334, 52 S. Ct. 512, 76 L. Ed. 1136. A tax on a sale made by a trustee under an order of court for purposes of liquidation if payable directly and primarily by him would doubtless be a burden on a governmental instrumentality, for a judicial sale in liquidation of a bankrupt estate would in a peculiar sense involve the exercise of a federal function. Indeed, without the exercise of such function and the power thus to dispose of assets, administra-

tion in bankruptcy would hardly be practicable. A tax on the vendee in connection with a sale in liquidation of a bankrupt's estate is, at least in a formal sense, quite different from a tax for which the vendor is made primarily liable. Not only would the tax be on the purchaser, rather than the trustee, but it would be a tax equivalent to that imposed on all persons in the community similarly situated. It is the policy of the courts ordinarily to treat such general taxes as valid. The limitation of exemptions to taxes directly and substantially interfering with government functions is being adhered to with more and more strictness. Indian Territory Illuminating Oil Co. v. Board of Com'rs, 288 U. S. 325, 53 S. Ct. 388, 77 L. Ed. 812; Fox Film Corp. v. Doyal, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010; Helvering v. Powers, 293 U. S. 214, 55 S. Ct. 171, 79 L. Ed. 291; United States Trust Co. v. Anderson (C.C.A.) 65 F. (2d) 575, 89 A.L.R. 994."

See also **Colorado National Bank of Denver v. Bedford**, 310 U. S. 41-53, 84 L. Ed. 1067, and **Wilson v. Cook**, 327 U. S. 474-498, L. Ed. 793.

It is, of course, doubtful that the city could enforce the collection of the tax by a civil suit against the University, and, likewise, doubtful that it could create a lien on the University's property for the collection of the tax. **Cox v. Board of Trustees**, supra. **City of Huntsville v. County of Madison**, 166 Ala. 389, 52 So. 326. This does not, however, in my opinion, prevent the city from enforcing the collection of the tax by placing the obligation and duty to collect on the servants, agents, or employees of the University who actually make the sales. 49 Am. Jur., States, Territories and Dependencies, Section 94, page 309. **Finnell v. Pitts**, 222 Ala. 290, 132 So. 2. **Commonwealth of Pennsylvania v. Fix**, 9 Fed. Supp. 272. **Allen v. Regents of University System of Georgia**, supra. In this latter case, it was said: "There is no reason why the State of Georgia should risk or ask its agents to risk penalties to determine whether this tax is collectible. Respondents would lose nothing by collecting the tax and turning it over to the United States."

So, assuming the validity of the ordinance as it applies to merchants in the city of Tuscaloosa, it is my opinion that the University Supply Store is not only authorized but required to collect the tax levied by said ordinance and pay it to the city, as is done by privately owned stores in the city on those sales which are not exempted by law.

Very truly yours,

SI GARRETT

Attorney General

November 21, 1952

Dr. D. G. Gill

State Health Officer

Department of Public Health

CAPITOL

Hospitals—Licenses—Words and Phrases.

1. Hospitals which accept charity patients only are not serving the public generally within the meaning of Act No. 530, General and Local Acts 1949, page 835, but hospitals accepting not only charity patients but also paying patients are serving the public generally within the meaning of said act.

2. A hospital serving only the members of religious or semi-religious or fraternal organizations is not serving the public generally within the meaning of Act. No. 530, supra, but if said hospital merely prefers patients of the above described classes and does accept others, said hospital is serving the public generally within the meaning of Act No. 530, supra.

3. A hospital, otherwise covered by the provisions of Act No. 530, supra, is not exempt from the provisions of said act on the grounds that it restricts its service to patients of a particular sex, race, or age group.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 7, 1952, is as follows:

"Re: Hospital Licensure Act

Act 530, 1949 Legislature

"Paragraph 204(42), Code of Alabama 1940, 1951 Cumulative Pocket Part, Title 22, Article 6, reads as follows:

" 'Definitions—as used in this article the term "hospitals" shall mean sanitoria, rest homes, nursing homes and other related institutions when such institution is primarily engaged in offering to the public generally facilities for the diagnosis and treatment of injury, deformity, disease or obstetrical care. The word "person" includes individuals, partnerships and associations.' (Underscoring supplied)

"During the three years that the above mentioned Act has been in effect the words '. . . . in offering to the public generally . . . .' has, more than any other phrase in the Act, been used by various persons as cause demanding their particular institution being exempted from the provisions of the Act.

"Opinions of the Attorney General dated June 12, 1950 and June 21,

1951 dealt with this question in so far as the phrase related to hospitals and infirmaries operated by State and Private Institutions including schools, universities, prisons and corrective schools. These opinions cleared up questions relating to specific institutions but did not effectively answer the basic question—the legal meaning of '. . . in offering to the public generally . . .' Since the June 21, 1951 opinion additional cases have arisen to question the meaning of the phrase and the Hospital Licensure Advisory Board, in a recent meeting, requested that an opinion be secured regarding the phrase in question.

"In addition to a decision of the basic meaning of the phrase, opinions are requested on the following questions:

"1. Is an institution, otherwise covered by the Act, exempt on the grounds that it accepts charity patients only?

"2. Is an institution, otherwise covered by the Act, exempt on the grounds that it accepts members of one religious or semi-religious or fraternal organization to the exclusion of others?

"3. Is an institution, otherwise covered by the Act, exempt on the grounds that it restricts its service to a particular sex, a particular race, or a certain age group?"

In the opinion dated June 21, 1951, referred to in your inquiry (Quarterly Report of Attorney General, Vol. 63, page 40), this office attempted to make distinctions between hospitals which were "primarily engaged in offering to the public generally facilities for the diagnosis and treatment of injury, deformity, disease or obstetrical care," and hospitals which did not offer their facilities to the public generally. In that opinion, I held that hospitals serving only the students and faculty of an educational institution were not serving the public generally; also, that hospitals serving only the inmates of a prison could not be said to be serving the public generally, while the Jefferson-Hillman Hospital in Birmingham was serving the public generally.

The types of institutions now described in your inquiry present additional questions involving matters of degree. It is apparent that the word "public" has many definitions. 35 Words and Phrases (Per. Ed.) page 12. The word must be construed in accordance with the context of the act in which it appears. Generally speaking, I believe the Legislature, in limiting the operation of Act No. 530, supra, to those hospitals which are "primarily engaged in offering to the public generally facilities for the diagnosis and treatment of injury, deformity, disease or obstetrical care," meant to exclude from the provisions and operation of said act those hospitals which merely offer their facilities to well defined and narrow segments of the population. When it comes to deciding what a well defined and narrow segment of the population is, however, there are difficulties involved in each particular case, and it would perhaps be well for the Legislature to more specifically describe those institutions which are subject to the provisions of Act No. 530, supra.

1. It is my view that a hospital that accepts charity patients only cannot be said to be serving the public generally. People who are unable to pay any part of their hospital bills in my opinion, are a well defined and limited group not constituting the general public. A hospital whose rules forbid the admission of all persons except those who must accept free hospital care is not serving the public generally within the meaning of Act No. 530, supra. Such hospitals, therefore, are not subject to the licensing provisions of said act.

On the other hand, it is my opinion that if a charity hospital does, if facilities are available, accept paying patients then that hospital would lose the characteristic of not serving the public generally and would be subject to the provisions of the licensing act.

2. The answer to your second inquiry is governed by the same principles referred to in answer to your first inquiry. If a hospital accepts only the members of a religious, semi-religious, or fraternal organization, then it cannot be said that such a hospital is serving the public generally. Such a hospital is serving only the members of that religious organization or that fraternal organization. A hospital of this type, to my way of thinking, has the same status so far as Act No. 530, supra, is concerned as a hospital serving only the students and faculty of an educational institution. The group acceptable is narrowly defined and limited to members. If the hospital actually confines its services to members of that religious or fraternal organization, it would not be subject to the provisions of the licensing act, supra. Your question numbered 2 is phrased so that it might be interpreted to mean that the type of hospital referred to is one which accepts members of a religious or fraternal organization in preference to others, but that such hospital, if facilities were available, would accept those who were not members of the religious or fraternal organization. If this is the case, it is my opinion that such hospital would then be serving the public generally, and would be subject to the provisions of Act No. 530, supra.

3. In answer to your third inquiry, it is my view that an institution, otherwise covered by the act, is not exempt from the provisions of the act on the grounds that it restricts its service to a particular sex, race, or to a certain age group. It is to be noted that a hospital which restricts its patients to a particular sex, or a particular race, or a certain age group has a much broader group of potential patrons than a hospital which serves only the members of a religious or fraternal organization. Likewise, such a hospital would be offering its services to all members of the general public of a particular sex, or of a particular race, or who belonged within a certain age group.

Section 1 of Act No. 530, supra, specifically includes institutions which offer obstetrical care, and clearly by the enumeration of this specific type of care the Legislature has indicated that it did not intend to exclude hospitals which limit its patients to women only. Therefore, if a hospital restricts its patients to females, it is clear to me that such a restriction does not take the hospital out of that class which serves the public generally. Such hospital would be subject to the provisions of Act No. 530, supra.

Neither do I believe that the Legislature intended to exclude from the operation of Act No. 530, supra, hospitals which accept only white patients or hospitals which accept only colored patients. It is generally known and understood that many of the hospitals in Alabama accept only one race or the other race. To hold that such hospitals are excluded from the licensing provision would make the act, supra, generally ineffective. Due to the widespread practice, therefore, of hospitals in Alabama accepting as patients only the members of one race, it is my opinion that restrictions as to race do not prevent the hospital from serving the public generally, and that such hospital is subject to the provisions of Act No. 530, supra.

I am also of the opinion that hospitals which serve only patients who are within certain age groups are not excluded by reason of such restriction from the operation of the licensing act, supra. Children's hospitals and hospitals which specialize in the care of the aged are in my opinion serving the public generally within those age groups. Such groups are large in size and include large enough segments of the population to be called the public generally.

Very truly yours,

SI GARRETT

Attorney General

December 3, 1952

Hon. C. T. Scott, Chairman

Board of Commissioners and Control

Cullman County

1107 Second Avenue, West

Cullman, Alabama

Counties—Cullman County.

The Board of Commissioners and Control of Cullman County is without authority to allow the chairman of the board an amount in excess of $2400.00 per annum fixed by Act No. 449, General and Local Acts 1951, page 801, to pay the compensation of a bookkeeper to keep the books and records of the county, such duty having been imposed upon the chairman by Act No. 449, supra.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion, bearing date of November 17, 1952, is as follows:

"I am the newly elected and qualified Chairman of the Board of Com-

missioners and Control created by a local Act of the Legislature of 1951, (Acts 1950 and 1951, p. 801) which Board of Commissioners and Control is in lieu of the Court of County Commissioners, and am writing you for your opinion under the provisions of Sec. 240 of Title 55 of the 1940 Alabama Code about the following questions of law:—
"A part of Section 14 of such Act reads as follows:

" 'The Chairman is hereby authorized to employ clerical and stenographic assistance to aid him in the performance of his duties and to fix the compensation to be paid therefor which shall not exceed the sum of $2400.00 per annum, which shall be paid one-half from the general fund of the County and one-half from the road and bridge fund of the County.'

"As you will note, nothing is said in said Act about a Bookkeeper for such Board of Commissioners and Control.

"Now, no person has been located who is deemed competent who will keep the books of such Board of Commissioners and Control for the $2400.00 per annum allowed for 'clerical and stenographic assistance' provided for by said local Act.

"Would it be legal for such Board to pass a resolution and spread it upon the minutes of such Board of Commissioners and Control to agree to pay enough to secure a competent Bookkeeper to keep and supervise the keeping of all the books of such Board of Commissioners and Control provided, of course, such compensation would not be unreasonable?"

Under Act No. 30, Local Acts 1939, page 13, there is created for Cullman County the office of Road and Bridge Commissioner. He is authorized by the act to employ a competent clerk at a salary of not more than $100.00 per month. The clerk has charge of all records having reference to the receipt and payment of money, and his duty is to keep county records and correspondence necessary to provide a complete record of all transactions concerning the establishment, construction, and maintenance of the roads and bridges in Cullman County.

By Act No. 357, Local Acts 1939, page 244, the Board of Revenue of Cullman County is established. The board is authorized to employ a competent clerk to keep correctly the minutes and financial records of the county at a salary not exceeding $100.00 per month. The act also provides that the probate judge of said county shall not be a member of the board, nor exercise any power, authority, or jurisdiction, nor perform any of the duties of the board.

Under Act No. 449, General and Local Acts 1951, page 801, the two above numbered acts are repealed, effective the first Monday after the second Tuesday in January, 1953. This act creates and establishes a Board of Commissioners and Control of Cullman County with the jurisdiction, power, and authority conferred on courts of county commissioners, boards of revenue, or other governing bodies by the general laws of Alabama not

in conflict with the act. In addition, specific authority is given to examine, audit, and allow, or disallow, settle, and pay all claims and demands against the county, except those relating to the Road and Bridge Fund. The board is authorized to employ an auditor and prescribe his duties and fix his compensation.

Under the act the chairman of the board has exclusive jurisdiction over the Road and Bridge Fund created therein, and, in addition thereto, has the same duties in connection therewith provided by Act No. 30, Local Acts 1939, page 13.

The chairman is under duty to write or supervise the writing of the minutes of all meetings of the board and to examine, audit and allow or disallow and settle and pay all claims against the Road and Bridge Fund. In addition, he is, in the main, the purchasing agent for the county.

Section 14 of the act provides as follows:

"The Chairman of the Board shall perform the duties of auditor and shall keep all books and records herein required as well as the books and records required to be kept by the general laws of this state, as well as such as he may deem advisable, to properly and correctly reflect the business and financial condition of the county. The Chairman is hereby authorized to employ clericical (sic) and stenographic assistance to aid him in the performance of his duties and to fix the compensation to be paid therefor which shall not exceed the sum of $2400.00 per annum, which shall be paid one-half from the general fund of the County and one-half from the road and bridge fund of the County . . ."

In the case of **In re Baumblatt**, 156 Fed. 422, the court there said:

"It scarcely admits of question that in common speech a 'clerk' includes a bookkeeper as well as other classes of servants."

Since the total amount for clerical help, under the acts repealed (Act No. 30, supra, and Act No. 357, supra), was not to exceed $2400.00, and since these same duties, plus some small additional clerical duties, are to be performed by the chairman of the board, I am inclined to the view that the Legislature intended that the $2400.00, fixed in said Section 14, be the maximum amount allowed for clerical and stenographic assistance to him in the performance of his duties.

It follows, therefore, that your question should be answered in the negative.

Very truly yours,

SI GARRETT

Attorney General

December 4, 1952

Hon. H. E. Holladay

City Attorney

Town of Pell City

Pell City, Alabama

Municipalities—Licenses.

When the police jurisdiction of two incorporated towns or cities overlap, and both municipalities seek to impose business licenses, the licenses shall be paid to and collected by only that municipality whose boundary, measured to the nearest point thereof, is closest to the businesses, trades, or professions sought to be licensed.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of October 27, 1952, is as follows:

"Mr. Joe Kilgroe, Mayor of the Town of Pell City, Alabama, has requested that I write you in regard to the following:

"There are several grocery stores and filling stations situated East of the Town of Pell City, Alabama, outside the corporate lilmits of said town, but within one and one-half miles of said corporate limits, and the Town of Pell City has, for many years, exercised police jurisdiction over this area, levying taxes, etc., incident thereto, according to the laws of the State of Alabama, and this area has been so claimed within the police jurisdiction of the Town of Pell City long before the incorporation of the Town of Oak Ridge, Alabama, said Town of Oak Ridge having been incorporated in the year 1949, and the corporate boundary line of the Town of Oak Ridge is closer to said area than the corporate boundary line of the Town of Pell City; however, at all times since the Town of Oak Ridge was incorporated, until the present date, the Town of Pell City has continued to exercise police jurisdiction over said area, and have collected taxes incident thereto, and no question has ever arisen previously, concerning this matter.

"The Town of Oak Ridge, Alabama, has now served notice effective as of November 1st, 1952, that they intend to take said area into their police jurisdiction, thereby ousting the police jurisdiction of the Town of Pell City, and the question which Mr. Kilgroe wishes your opinion on is, viz., whether the Town of Pell City or the Town of Oak Ridge has the superior right to claim said area in their police jurisdiction and thereby levy taxes incident thereto, in accordance with the laws of the State of Alabama."

From the facts set out in your request, it appears that the grocery stores and filling stations, upon which license fees or taxes are sought to be imposed, are closer to the corporate boundary of the town of Oak Ridge than to the town of Pell City. Therefore, the town of Oak Ridge has a superior right to impose and collect licenses on these businesses. (I assume, of course, that the businesses in question are within the police jurisdiction of both municipalities within the meaning of Title 37, Section 9, Code of Alabama 1940, and Act No. 502, General Acts 1943, page 477.)

The question involved has been litigated in the Alabama courts. Also, Act No. 502, supra, appears to settle the question. This act, permitting licenses on businesses, etc., within the police jurisdictions of municipalities, contains a proviso that ". . . when the place at which any such business, trade or profession is done or carried on within the police jurisdiction of two or more municipalities which levy the licenses thereon authorized by this act, such licenses (shall be) paid to and collected by the municipality only whose boundary measured to the nearest point thereof is closest to such business, trade or profession."

The most recent Alabama case on the subject is **Town of Graysville v. Johnson**, 33 Ala. App. 479, 34 So. 2d. 708, cert. den. 250 Ala. 507, 35 So. 2d. 339 (for failure to file timely application). This case held that the town nearest to the location of the business to be licensed had the superior authority to impose licenses pursuant to Act No. 502, supra, where the police jurisdiction of two or more municipalities overlapped.

The earlier case of **City of Homewood v. Wofford Oil Co.**, 232 Ala. 634, 169 So. 288, is not entirely apposite since the taxing period involved in that case antedated the enactment of the above quoted proviso of what is now Act No. 502, supra. (Act No. 235, General Acts 1932, Extra Session, page 240.) This case held that since the city of Birmingham had acquired pre-existing police jurisdiction over the area in which the businesses involved were located and this jurisdiction had not been withdrawn by statute, the police jurisdiction of the city of Homewood did not attach during the period in question so as to authorize the latter municipality to impose business licenses.

The **Graysville** case, supra, states that the **Homewood** case held that "a levy by a city of a license to operate a business within its police jurisdiction precluded another city from subsequently collecting a similar tax from the same business which was also located within the latter's police jurisdiction." (34 So. 2d. 708, 710.) As this statement intimates that superior right to license depends on which municipality first sought to license the businesses concerned, it is important to remember that the **Homewood** decision covered a taxing period prior to the 1932 proviso. That proviso, as incorporated in Act No. 502, supra, and the **Graysville** case make it quite clear that the town of Oak Ridge, as the closer of the two municipalities involved in the opinion at hand, has the superior right to levy and collect

business licenses. Cf. Quarterly Report of Attorney General, Vol. 24, page 62.

Yours very truly,

SI GARRETT

Attorney General

December 4, 1952

Hon. M. R. Joiner

Register, Circuit Court

Talladega County

Talladega, Alabama

Registers—Commissions—Costs and Fees—Condemnation—

Opinions Overruled, Modified, and Distinguished.

1. A register, in selling an automobile condemned for carrying prohibited liquors, is entitled to receive a commission on sales, as provided for in Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 374, General Acts 1947, page 262.

2. A register, who sells a condemned automobile and collects and remits to the State Law Enforcement Fund a part of the proceeds of the sale, is entitled to receive a commission of five per cent, as provided for by Title 11, Section 22, Code of Alabama 1940.

3. Quarterly Report of Attorney General, Vol. 63, page 57, overruled.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

You have requested a reconsideration of an opinion of this office rendered under date of June 26, 1951, and found in Quarterly Report of Attorney General, Vol. 63, page 57. This opinion held that when a register sells an automobile, which has been condemned for carrying prohibited liquors, and receives a fee or commission for making the sale of the automobile under the decree of the court, as provided for in Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 374, General Acts 1947, page 262, he is not entitled to receive an additional fee of five per cent, as prescribed by Title 11, Section 22, Code of Alabama 1940. The opinion above cited was based upon an opinion of this office under date of November 13, 1941, and appearing in Quarterly Report of Attorney General, Vol. 25, page 143. This latter opinion held that when the register sold land in order to foreclose a

lien for taxes, he should receive his commission on sales, as provided for in Section 27, as amended, supra, but further, that the making of the sale naturally contemplated the remittance of the money to the parties entitled thereto. The party entitled to the money, under the facts stated in that opinion, was the State of Alabama. It was held that the register was not entitled to an additional fee of five per cent provided for in Section 22, supra.

Upon further consideration, I am of the opinion that the opinion of this office rendered under date of June 26, 1951 (Quarterly Report of Attorney General, Vol. 63, page 57), is in error and should be overruled. I am further of the opinion that when a register sells an automobile, which has been condemned for carrying prohibited liquors, he is not only entitled to receive his commission on sales as prescribed by Section 27, as amended, supra, but is also entitled to receive the five per cent commission prescribed by Section 22, supra.

This office has heretofore specifically held that the register is entitled to a commission on sales when the sale made is one of a motor vehicle which has been condemned for transporting prohibited liquor. Biennial Report of Attorney General 1928-1930, page 883. This, of course, is the commission on sales provided for in Section 27, as amended, supra. Furthermore, this office has heretofore held that the register is entitled to receive the five per cent commission for collecting and remitting that part of the proceeds of the sale of the condemned vehicle to the Law Enforcement Fund of the State of Alabama. Biennial Report of Attorney General 1934-1936, page 74. In a more recent opinion, under date of December 22, 1947, this office authorized the payment to the register of the five per cent commission provided for in Section 22, supra, when the register could not legally receive his commission on sales, as provided for in Section 27, supra. Quarterly Report of Attorney General, Vol. 49, page 149.

After further consideration, it is my opinion that Section 27, as amended, supra, and 22, supra, have an entirely separate field of operation in those cases where a condemned automobile is sold by the register. When the register sells an automobile which has been condemned under a decree of the court, he is performing an entirely different act from the act he performs in collecting and remitting the State's share of the proceeds to the State Law Enforcement Fund. The sale of the vehicle is separate and distinct from the remitting of the proceeds to the State. The law provides for compensation for both acts. In conclusion, therefore, when an equity court condemns a motor vehicle for transporting prohibited liquor and orders that the vehicle be sold and the register sells said vehicle, he is entitled to his commission on sales under Section 27, as amended, supra. When the register collects and remits part of the proceeds of the sale to the State Law Enforcement Fund, he is entitled to retain five per cent, as authorized by Section 22, supra. The opinion appearing in Quarterly Re-

port of Attorney General, Vol. 63, page 67, is therefore overruled.

Yours very truly,

SI GARRETT

Attorney General

December 4, 1952

Hon. W. T. Terry

State Superintendent of Education

Montgomery 4, Alabama

County Boards of Education—City Boards of Education—Schools—Counties—Municipalities.

1. Where a municipality has annexed county territory, said territory shall continue to be under the supervision of the county board of education for school purposes until an agreement has been reached concerning existing school indebtedness in said territory between the city board of education, the city commission, and the county board of education (Title 52, Section 83, Code of Alabama 1940).

2. City boards of education may not pay out money for the maintenance or repair of schools which are under the supervision of the county board of education pending the reaching of an agreement by a board of arbitration, as provided for by Title 52, Section 84, Code of Alabama 1940, as amended by Act No. 430, General and Local Acts 1949, Page 626.

3. The money derived from a tax levy by a municipal corporation under the authority of Title 37, Section 700, Code of Alabama 1940, may not be turned over to the county board of education to be expended by the county board of education for repairs and alterations of school buildings under the supervision and control of the county board of education.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of August 21, 1952, is as follows:

"I am transmitting to you copies of letters from Dr. L. Frazer Banks, Superintendent of City Schools, Birmingham, Alabama and Dr. I. F. Simmons, Superintendent of Jefferson County Schools. I should like to ask your interpretation of three questions concerned in Title 52, Sections 83 and 84, Code of Alabama 1940.

"Question No. 1. Can two boards of education enter into an agreement for the operation of schools under the terms on which they are ready to agree and leave the matter of 'existing indebtedness' to the arbitration committee to settle later?

"Question No. 2. If the county continues to operate these schools, can the city board of education legally pay money out of the tax voted for the use of city schools of Birmingham? If your answer is in the affirmative, can they also pay from time to time money for making other repairs, alterations, and additions for these buildings out of that same fund?

"Question No. 3. Can the City Board of Education of Birmingham pay to the County Board of Education for repairs, alterations on these buildings in the newly annexed territory, as outlined in Question No. 2 above, limiting the payment to the amount of money calculated to come from the newly annexed territory concerned as payment on the 3½-Mill city tax levied for school purposes? The proceeds from this particular tax from this territory as calculated is being held by the Birmingham City Board of Education for repairs and alterations.

"This special public tax election was held in the City of Birmingham on May 1, 1951."

In my opinion, the answer to Question No. 1 must be in the negative. Title 52, Section 83, Code of Alabama 1940, provides as follows:

"When any part of the territory embracing a school under the supervision and control of the county board of education is annexed to a city having a city board of education by extension of the corporate limits of such city, the county board of education shall retain supervision and control of said school and for school purposes shall retain the same control of the territory and revenues which it exercised prior to such annexation, for the purpose of using and devoting said school to the benefit of all children who were or would be entitled to the use and benefit of the school so long as it was a county school, until an agreement has been made between the county board of education and the city board of education, and the city council or commission or other governing body of the city to which the territory was annexed, with reference to the matter of existing indebtedness and of providing the same or equivalent school facilities for the children in that part of the territory in the school district or districts not annexed or made a part of such city." (Emphasis supplied.)

According to the letters attached to your request, the City Board of Education of Birmingham, the County Board of Education of Jefferson County, and the City Commission of Birmingham were unable to agree on all the school finance aspects of the transfer of this newly annexed city territory from county to city jurisdiction. Consequently, the matter of existing indebtedness has been submitted to a board of arbitration, as required by Title 52, Section 84, Code of Alabama 1940, as amended by Act No. 430,

General and Local Acts 1949, page 626.. The only disagreement which has been submitted to the board of arbitration concerns this matter of existing indebtedness. Section 83, supra, expressly provides that the county board of education shall operate all schools in this newly annexed territory until an agreement has been made. Since the two boards and the city governing body have not been able to agree and have submitted the matter for arbitration, in my opinion, the two boards cannot enter into any agreement which is contrary to the terms of Section 83, supra.

In my opinion, the answer to Question No. 2 must also be in the negative. Section 83, supra, provides that until the matter of existing indebtedness in the territory annexed is settled, the county board of education shall continue to supervise and control said territory and any schools located therein. Since the county must continue to operate these schools, it is my opinion that the city may not legally pay money out of city funds to repair, alter, or make additions to any school buildings on the land in question. Furthermore, in my judgment, the question of spending either city or county funds for the maintenance or repair of school buildings within the newly annexed territory is one which may be considered by the board of arbitration. Until an agreement is reached by the board of arbitration and while the schools in question are thus being operated by the County Board of Education of Jefferson County, only county funds may be used in the operation of these schools.

It is my opinion that the case of **Carey v. City of Haleyville, et al.**, 230 Ala. 401, 161 So. 496, does not apply to the facts here involved. Applying said case to this situation would hamper the effective operation of Section 83, supra, which, as I construe it, has for its purpose the maintenance of the **status quo** pending settlement by arbitration.

Question No. 3 must also be answered in the negative. Your attention is directed to Quarterly Report of the Attorney General, Vol. 54, page 57, wherein it was concluded that under the authority of Title 37, Section 700, Code of Alabama 1940, funds derived from a tax levy by a municipal corporation on property situated within the corporate limits of such municipality, may not be turned over to a county board of education to be expended by the county board of education in constructing school buildings. It is clear from Section 83, supra, that no municipal revenues should be expended in newly annexed territory unless and until the agreement contemplated by this section has been reached.

Very truly yours,

SI GARRETT

Attorney General

December 5, 1952

Hon. G. H. Howard

Judge of Probate

Elmore County

Wetumpka, Alabama

Counties—Funds—Warrants.

1. The requirements of Title 12, Section 78, Code of Alabama 1940, are met if the county governing body authorizes transfer of funds in sufficient amount to satisfy prospective warrants to be issued at the same time that authorization for issuance of such warrants is granted, thereby making money available for the satisfaction of such warrants upon presentation for payment by the payees.

2. Transfer of such funds should be effected prior to or as nearly simultaneously with the actual issuance of such warrants as circumstances will permit.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion is as follows:

"Title 12, Section 78 of the Code of Alabama, 1940 provides: 'No warrant or order for the payment of money shall be issued in pursuance of authority of the Board of Revenue, County Commissioners or other like governing body until funds are available for its payment upon presentation to the treasurer or depository.'

"I would like to have your opinion on the construction of the above quoted provision as applied to following facts, and whether the following actions would violate the same.

"Elmore County carries an account with the First National Bank of Wetumpka designated as 'Farm to Market Fund.' When the Court of County Commissioners meets, the various claims are audited and appropriate claims payable out of this fund are ordered paid therefrom. The practice is to date all warrants payable from this fund the same as the date authorizing payment. All those warrants are not necessarily delivered immediately and at times there would not be enough on deposit in this particular fund to take care of all such warrants. However, the Court, at the same time the aforesaid warrants are ordered to be issued, makes another order directing a transfer of a sufficient amount from the General Fund to the Farm to Market Fund to take care of all such warrants authorized to be issued. In some instances the warrant on the General Fund to be deposited in this Farm to Market Fund would actually bear a later date than the aforesaid warrant, but the actual transfer would be completed before actual de-

livery of the warrants against the Farm to Market Fund.

"Although the record might show on its face insofar as dates are concerned that the aforesaid section was violated, I venture to suggest that under the circumstances outlined there is no such violation but I would like to have your opinion thereon.

"In a few instances warrants issued against the said Farm to Market Fund have been mailed out to distant payees thereof before the above mentioned transfer of funds to the Farm to Market Fund, but in every such instance we have been sure that the actual transfer from the General Fund to the Farm to Market Fund was made in ample time so that by the time any warrant reached the depository for payment or could even reach the payee, the funds would be in the proper account for payment.

"Under such circumstances it would appear that we are not violating the aforesaid provision of the statute.

"I venture the suggestion that a proper construction of the applicable statute turns upon the legislative intent in the use of the words 'until funds are available for its payment upon **presentation** to the treasurer or to the depository,' and upon the words '**shall be issued.**'

"It would appear that in any event a warrant is not issued until it is actually brought into circulation and clearly, although a warrant bears a certain date, nevertheless it could not be said to be issued until the actual delivery to the payee. Furthermore, it would appear that the law is substantially complied with when funds are available upon actual presentation of the warrant to the treasurer or depository. We have been criticized by the examiner for the foregoing practice and custom, and in fact have been accused of violating the above quoted provision of the law. It would work a real hardship on the office force if we are to be bound by what I consider to be a too narrow or hypercritical construction of this statute."

I have before me your request for opinion, together with copies of somewhat voluminous correspondence you have had with the Chief Examiner of Public Accounts pertaining to this particular matter. It appears that you only request that I interpret and construe the provisions of Title 12, Section 78, Code of Alabama 1940, as they pertain to a set of facts presented by you in your request. Section 78, supra, provides, in pertinent part, as follows:

"No warrant or order for the payment of money shall be issued in pursuance of authority of the board of revenue, county commissioners or other like governing body until funds are available for its payment upon presentation to the treasurer or depository . . ."

As I construe this statute, it pertains to and places a restriction upon the issuance of warrants or other orders for the payment of money by the county governing body until certain conditions exist, namely, "until funds

are available for its payment upon presentation to the treasurer or depository."

I am quite in agreement with you that a warrant or other order would not be deemed "issued" until it is actually placed in circulation by forwarding or otherwise delivering same to the payee. However, I would hesitate to say that same is not in fact issued until it is actually in the hands of the payee, as I feel that it could be well argued that posting same by regular mail, properly addressed to the payee, could well constitute "issuance" within the meaning of this statute. However, I feel this to be a rather hypertechnical distinction and of scant importance to the question presented.

I further gather from the correspondence before me that this seeming controversy arose in part from the fact that such warrants or other orders bear a date prior to that of actual issuance. I consider this to be a matter of bookkeeping procedure rather than of legal significance, but can readily see wherein this fact could have contributed to the existing misunderstanding. I likewise note that you apparently share this feeling when you state in your request that it is possible that the record might show on its face that there was a violation of Section 78, supra.

I am likewise of the opinion that, predicated upon the facts set forth in your request, it would appear that there was at all times sufficient money available for the payment of such warrants or other orders upon presentation, inasmuch as you state that transfer from the General Fund to the Farm to Market Fund of sufficient amount to satisfy all of such warrants was authorized at the same time that such warrants were authorized to be issued. This, to my mind, satisfies the requirements of Section 78, supra, as to availability of funds prior to the issuance of such warrants or other orders, and from this point on it is my thought that this matter devolves itself into one of mechanical or ministerial administrative procedure to best assure the orderly conduct of the affairs of the county. In this regard, it is my opinion that, sufficient funds being available prior to the issuance of the warrants in question by reason of the authorized transfer from the General Fund, such transfer should be effected prior to, or as nearly simultaneously with, the actual issuance of such warrants as would be possible under the existing circumstances. In this way you could erase any doubt as to the actual availability of funds and certainly avoid any possible embarrassment that might arise should one of the warrants so issued be presented for payment before the actual transfer of available funds be made. Here again, I consider this to be a matter of sound administrative practice rather than of legal significance.

In conclusion, it is my opinion that, based upon the facts you have presented, no substantive violation of Section 78, supra, may be charged to you. I have taken the liberty of setting forth what I feel to be the sound administrative procedure to be followed in such instance, solely due to the fact that it appears that it is here that this controversy has arisen,

and in the hope that by following the same any further controversies of this nature may be avoided.

Very truly yours,

SI GARRETT

Attorney General

December 8, 1952

Hon. T. C. Almon

Judge of Probate

Morgan County

Decatur, Alabama

Constitutional Amendments—Judges of Probate—Costs and Fees—Funds—Licenses—Driver's License—Motor Vehicles.

1. The constitutional amendment proposed by Act No. 755, General and Local Acts 1951, page 1305, submitted November 4, 1952, and proclaimed ratified November 19, 1952, restricting the expenditure of monies derived from certain taxes relating to motor vehicles and fuels, does not affect the fees of probate judges for issuing a license tag, driver's license, or temporary instruction permit, or the commission of probate judges for remitting license tag receipts.

2. The said constitutional amendment covers and restricts the expenditure of the fifteen cents formerly payable into the general fund of the county out of driver's license receipts and temporary instruction permits.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of November 20, 1952, is as follows:

"On November 4, 1952, Proposed Amendment No. 1, which was in words and figures, as follows:

" 'Shall the following be adopted as an amendment to the Constitution of Alabama?

" 'No moneys derived from any fees, excises, or license taxes, levied by the State, relating to registration, operation, or use of vehicles upon the public highways except a vehicle-use tax imposed in lieu of a sales tax, and no moneys derived from any fee, excises, or license taxes, levied by the State, relating to fuels used for propelling such vehicles except

pump taxes shall be expended for other than cost of administering such laws statutory refunds and adjustments allowed therein, cost of construction, reconstruction, maintenance and repair of public highways and bridges, costs of highway rights-of-way, payment of highway obligations, the cost of traffic regulation, and the expense of enforcing state traffic and motor vehicle laws. The provisions of this Amendment shall not apply to any such fees, excises, or license taxes now levied by the State for school purposes for the whole State or for any county or city board of education therein,' (Under the provisions of Act No. 755, 1951), was adopted by the qualified electors of the State of Alabama to become effective on the date that the Governor proclaims and ratifies the same.

"Under a Local Act of the Legislature, which was approved May 28, 1943, and which became effective on and after October 1, 1943, the Judge of Probate of Morgan County, Alabama, was placed on an annual salary basis, Section 2 of said Act reads, as follows:

" 'On and after October 1, 1943, said Judge of Probate shall collect all moneys, fees, compensation, commissions, allowances, costs, percentages, emoluments and other items allowed to and provided for a judge of probate by the general laws of Alabama then and thereafter in force, except as otherwise provided by local act applicable to Morgan County, and shall pay the same to the Chairman of the Board of Revenue and Control of Morgan County, who shall promptly deposit the same in the general fund of said county. All such money collected during one calendar month shall be paid to said Chairman of said Board on or before the tenth day of the following month.'

"This Act was amended by the Local Act approved July 6, 1943, which will be found on page 208 in Local Acts of Alabama of 1943, and also by a Local Act approved June 23, 1945, being Act No. 164 of the Legislature of 1945, Local Acts of 1945, page 81, and again on August 16, 1949, by Act No. 398, which will be found in General and Local Acts of Alabama regular session 1949 at page 569.

"On and after October 1, 1943, all moneys, fees, compensations, commissions, allowances, costs, percentages, emoluments and other items allowed to and provided for a Judge of Probate by the General Laws of Alabama, have been by me paid each month to the Chairman of the Board of Revenue and Control of Morgan County, Alabama, on or before the 10th day of the following month.

"I have before me a memorandum to all Judges of Probate, License Commissioners, County Treasurers and Budget Clerks from Ralph P. Eagerton, Chief Examiner of Public Accounts, the pertinent part of which reads as follows:

" 'MEMORANDUM

" 'TO: All Judges of Probate, License Commissioners, County Treasurers and Budget Clerks.

" 'FROM: Ralph P. Eagerton, Chief Examiner.

" 'SUBJECT: Revised accounting procedure made necessary by the adoption of the constitutional amendment proposed by Act No. 755, Acts of 1951, page 1305, pertaining to fees or taxes relating to use, etc., of vehicles and fuels used for vehicles.

" 'The above constitutional amendment, listed as Amendment No. 1 on the ballot of November 4 and that date adopted by the voters of the State, will become effective on the date that the Governor proclaims same ratified. You will later be informed as to the date of the Governor's proclamation. All revenue accruing to the county from motor vehicle license tax, driver's licenses and learner's permits issued prior to the close of business on the date immediately preceding the date of the Governor's proclamation must be remitted within twenty days after the end of the month of November and deposited to the credit of the General Fund of the County.

" 'All revenue derived from the above named sources subsequent to the close of business on the day immediately preceding the date of the Governor's proclamation must be remitted in accordance with law and deposited to the credit of a special fund to be designated the Public Highway and Traffic Fund. Revenue accruing to such special fund may be used only for the purposes stated in the above mentioned Amendment No. 1. There will be no change in the remittances of revenue from the above stated sources to the State or municipalities. However, in remitting same information should be furnished showing the portion of such revenue accruing prior to the date of proclamation and that accruing subsequent thereto.

" 'For the purpose of correct accounting the motor vehicle license register and monthly report should be sub-totaled after all licenses issued prior to the date of the proclamation have been entered. When all licenses issued for the month have been entered the distribution, insofar as the county's revenue is concerned, should be made so that the county's portion of the sub-total will go to the county's General Fund and the county's portion of the remainder to the Public Highway and Traffic of the county.

" 'All driver's licenses and learner's permits issued prior to the date of the proclamation should be reported as of the close of business preceding the proclamation date and the reports should bear a notation "Last report prior to constitutional amendment." When remittance of the county's portion of the revenue from this source is made to the county after the end of the month, all revenue derived prior to the date of the proclamation accrues to the county's General Fund and all revenue derived on the date of the proclamation and subsequent thereto accrues to the county's Public Highway and Traffic Fund.

" 'All officials charged with keeping county books are directed to open in their books a newly created fund and designate said fund the Public Highway and Traffic Fund.'

"As I anticipate the Governor's Proclamation ratifying Amendment No. 1, at an early date, I would like the benefit of your official opinion on the following questions:

"First: Since the office of the Probate Judge of Morgan County is on a salary basis, would the Revenue derived from motor vehicle issuance fees, which is 75c for private cars and 50c for all other vehicles, and the fees for issuing driver's licenses and learner's permits, be covered by the above recited Constitutional Amendment?

"Second: Since the office is on a salary basis, and all fees that we collect from all sources are paid into the General Fund of the County, should we keep separate and remit in a separate check, all fees accruing from the sale of automobile license plates, driver's licenses and learner's permits, and the commissions thereon in a separate check from other remittances to the County?

"Third: The fees allowed to the Probate Judge from the sale of automobile tags, driver's licenses and learner's permits, together with the commissions thereon are paid by me into the General Fund of the County. The County in turn pays me a salary and the expense of operating the office from said fees. I am interested in knowing for my own protection whether or not the fees covered by the Constitutional Amendment are to be used for highway purposes only, and should be kept separate from the other fees of the office?

"Since I have to remit on or before December 10th, I would appreciate your early opinion on this subject."

Since all of your inquiries are related, it is advisable to discuss the answers to them together.

There are several distinct items referred to in your inquiry. These items are specifically as follows:

(a) The issuance fee in the amount of fifty cents or seventy-five cents which is allowed to the probate judge for issuing a license tag. Title 51, Section 714, Code of Alabama 1940, as amended by Act No. 681, General and Local Acts 1951, page 1171.

(b) The commission allowed to probate judges in the amount of two and one-half percent for remitting motor vehicles license tag receipts to the State, to the counties, and to municipalities. Title 51, Section 712, Code of Alabama 1940, as amended by Act No. 973, General and Local Acts 1951, page 1646.

(c) The amount of ten cents retained by the probate judge out of driver's license receipts and temporary instruction permits. Title 36, Section 61, Code of Alabama 1940, as amended by Act No. 485, General and Local Acts 1951, page 868.

(d) The amount of fifteen cents retained by the judge of probate and payable to the general fund of the county out of receipts derived from the

issuance of driver's license receipts and temporary instruction permits. Section 61, as amended, supra.

In my opinion, items (a), (b), and (c) above are fees which the probate judge is entitled to receive and are not covered by the constitutional amendment proposed by Act No. 755, General and Local Acts 1951, page 1305, submitted November 4, 1952, and proclaimed ratified November 19, 1952, and referred to in your inquiry; but, under the provisions of the local act referred to in your inquiry, are to be paid into the general fund of the county and when so paid are not subject to the provisions of said amendment.

Item (d) above, in my opinion, is covered by the provisions of the constitutional amendment referred to in your inquiry, and must be paid into the "Public Highway and Traffic Fund" of the county and expended only in accordance with the restrictions in said constitutional amendment.

It will be noted that said amendment is restrictive in nature and requires that certain revenues be expended only for certain purposes. Before the expenditure of the monies referred to in the amendment is restricted to the uses prescribed in the amendment, the monies must be derived from (1) fees, excises, or license taxes; (2) those fees, excises, or license taxes must be levied by the State of Alabama; and (3) they must relate either to (a) the registration, operation, or use of vehicles upon the public highways (except the use tax), or (b) must relate to fuels used for propelling vehicles used upon the public highways (except pump taxes).

If the monies derived meet all the requirements above noted, the expenditure of such monies is restricted to the following uses:

(1) The cost of administering such laws;

(2) Statutory refunds and adjustments allowed therein;

(3) The cost of construction, reconstruction, maintenance and repair of public highways and bridges, cost of highway rights-of-way, and payment of highway obligations;

(4) The cost of traffic regulation and the expense of enforcing State traffic and motor vehicle laws.

It is further to be noted that the amendment is not applicable to any taxes levied by the State for school purposes.

In my opinion, items (a), (b), and (c) are not covered by the amendment for the reason that said items are not fees relating to the registration, operation, or use of vehicles upon the public highways.

Item (a) is an issuance fee. It is compensation to which the probate judge is entitled for the services performed in issuing license tags to applicants. The fee, in my opinion, does not "relate to the registration, operation or use of vehicles upon the public highways." The fee relates to the service that the judge of probate performs in issuing the license tag, and

cannot be said to relate to the registration, operation, or use of a vehicle upon the public highways.

The same may be said concerning the commissions identified in item (b). Item (b) is a commission or fee or allowance intended to compensate the probate judge for remitting the license tag revenues to the State, to the county, and to the municipalities. Although the tag tax, of course, relates to the registration, operation, or use of vehicles upon the public highways, that part of the tag tax revenues allowed to be retained by the probate judge as his commission for remitting (item (b)), does not relate to the registration, operation, or use of vehicles upon the public highways. This commission or fee relates to a service performed by the probate judge.

Item (c), in my opinion, is also a fee not relating to the registration, operation, or use of vehicles upon the public highways. It is a fee or compensation allowed to the probate judge for his service in receiving an application for a driver's license or for issuing a temporary instruction permit. The service that the judge of probate performs, and for which he is entitled to receive a fee, does not relate to the registration, operation, or use of vehicles.

Item (d), in my opinion, is covered by the provisions of the constitutional amendment. The fifteen cents which is to be paid into the general fund of the county out of the $2.25 charged for drivers' licenses and the fifteen cents which is to be paid into the general fund of the county out of the thirty-five cents charged for temporary instruction permits are simply a distribution of that amount of revenue to the county rather than to the State Highway Patrol Fund. Item (d) is a tax relating to the operation or use of a vehicle upon the public highways, even though such revenues are received by the county rather than by the State. For this reason, therefore, item (d), which was heretofore payable into the general fund of the county, must now be paid into the Public Highway and Traffic Fund of the county and must be expended only in accordance with the restrictions in said amendment. You will note, therefore, that in making your remittances to the county it must be indicated on the check or voucher sent to the county treasurer that item (d) should be paid into the Public Highway and Traffic Fund and not into the general fund.

According to the local law referred to in your inquiry, all monies, fees, compensation, commissions, allowances, costs, percentages, emoluments, and other items allowed to the probate judge must be paid into the general fund of the county. Item (d) is not monies, fees, compensation, commissions, allowances, costs, percentages, emoluments, or other items allowed to the probate judge. Item (d) is revenue belonging to the county, and before the amendment was payable into the general fund of the county, but which must now be paid into the Public Highway and Traffic Fund by reason of the amendment. Items (a), (b), and (c), under the provisions of the local law, supra, are to be remitted to the county general fund and may be used by the county without reference to the restrictions in the

constitutional amendment, including the payment of the salary of the judge of probate.

Very truly yours,

SI GARRETT

Attorney General

December 19, 1952

Hon. Creel Richardson

County Superintendent of Education

Dale County

Ozark, Alabama

Schools—County Boards of Education—City Boards of Education—Teachers.

1. In order to provide more economical or efficient administration of the schools, a county board of education has the power and authority to transfer to a city board of education the property, administration, supervision, and control of a county high school located within the city.

2. Should the property, administration, supervision, and control of a county high school located within a city be transferred by the county board of education to the city board of education, the teachers in such a school would lose their tenure rights in the county system if transfer of the school resulted in a decrease in the number of teaching positions in the county system.

3. Should the property, administration, supervision, and control of a county high school located within a city be transferred by the county board of education to the city board of education, the two boards can enter into an agreement prescribing the terms and conditions under which students living within the county may attend the city school, but the terms and conditions expressed in such an agreement, while remaining in effect until changed, would not be binding upon future boards, which could alter the agreement as changed educational conditions may require.

4. The necessity and advisability of transferring from the county board of education to the city board of education, the property, administration, supervision, and control of a county high school located within a city, is a matter primarily addressing itself to the sound judgment and discretion of the two

boards, and the State Superintendent of Education cannot force or overturn their decision in this respect, except as provided by Title 52, Sections 44 and 47, Code of Alabama 1940. Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of August 11, 1952, is as follows:

"The Dale County Board of Education is operating, maintaining and supervising a High School in Ozark, Ala., and serving the high school needs of students in Ozark and all the surrounding territory.

"The City of Ozark Board of Education is operating, maintaining and supervising elementary schools in Ozark, Ala., and serving the education needs of elementary and grammar school students in Ozark, and surrounding territory.

"A movement is being agitated to have the Dale County Board of Education transfer to the Ozark City Board of Education the property, the administration, supervision and control of the High School at Ozark.
"In order that an orderly solution of this matter be arrived at, I am directed by the Board of Education to propound to you the following inquiries:

"(1). Can the County Board of Education legally transfer the property, the administration and supervision of the Dale County High School at Ozark to the City Board of Education of Ozark?

"(2). If this can be legally done, would the present teachers in the Dale County High School at Ozark have the same teacher tenure status as they now have under the County Board of Education?

"(3). If No. (1) is answered in the affirmative, can an agreement be entered into by and between the members of the present Boards relative to the admission of out-of-town students to the High School at Ozark and the matters of fees to be charged be binding on future members of the two Boards?

"(4). In the event the two Boards are unable to reach an agreement on the proposed transfer, can the State Superintendent of Education take the matter out of the hands of the Dale County Board of Education, or the City Board of Education, and make final disposition of the matter without the consent of both these local Boards?

"These questions are of considerable importance, and in order to solve the matter and do what is considered best for the school interests of the county, we would appreciate an early reply.
"In connection with these queries, I particularly call your attention to Title 52, Sections 47, 71, 82, 99, 158, 160, 161, 373 and 435 of the Code of Alabama of 1940."

1. In my opinion, your first question should be answered in the affirmative.

Title 52, Section 62, Code of Alabama 1940, provides as follows:
"The general administration and supervision of the public schools of the educational interests of each county, with the exception of cities having a city board of education, shall be vested in the county board of education. Provided, however, such general administration and supervision of any city having a city board of education may be consolidated with the administration and control of educational matters affecting the county and vested in the county board of education."

". . . . such boards (county boards of education) may prescribe reasonable methods of raising funds, employ, supervise, consolidate, build, insure, transfer school children and transport them in providing and operating a uniform and effective system of public schools throughout the counties of the state. **Board of Education of Jefferson County v. State ex rel. Kuchins** (Ala. Sup.), 131 So. 239. . . . . and the general administration and supervision of educational interests are vested in said boards." **Hughes v. Hartford Accident, etc., Co.**, 223 Ala. 59, 134 So. 461.

The effect of Section 62, supra, is a delegation to the county board of education "of complete control of the educational affairs of the county, to be exercised in their discretion, except as limited by law." Biennial Report of Attorney General, 1934-1936, page 263.

Title 52, Section 71, Code of Alabama 1940, provides as follows:

"All the property, estate, effects, money, funds, claims and donations now or hereafter vested by law in the public school authorities of any county for the benefit of the public schools of any county are hereby transferred and vested in the county board of education, and their successors in office. Real and personal estate granted, conveyed, devised or bequeathed for the use of any particular county, school district, or public school, shall be held in trust by the county board of education for the benefit of any such county school district or school."
Title 52, Section 99, Code of Alabama 1940, provides as follows:

"The county board of education shall have the right to acquire, purchase by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes. It may sue and contract, all contracts to be made after resolutions have been adopted by the board and spread upon its minutes. All processes shall be executed by service on the executive officer of the board."

Title to real property deeded to school trustees for school purposes vests in the county board of education under Section 71, supra, and the said property, together with school equipment, may be transferred or conveyed by the said board under the authority of Section 99, supra. Quarterly Report of Attorney General, Vol. 22, page 149; Quarterly Report of Attorney General, Vol. 39, page 20.

Title 52, Section 158, Code of Alabama 1940, provides as follows:
"The city board of education is hereby vested with all the powers necessary or proper for the administration and management of the free public schools within such city and adjacent territory to the city which has been annexed as a part of the school district which includes a city having a city board of education."

Supplementing your formal request for opinion, you have advised me that the school in question originally belonged to the city, which on September 28, 1922, transferred it to the county in order to provide for more economical or efficient administration of the school.

In view of the broad authority vested in county and city boards of education, by Sections 62 and 158, supra, to determine and administer the educational policies of the counties and cities of the state, in my judgment, the county board of education of Dale County, in order to provide more economical or efficient administration of the schools, has the power, by contract or other agreement, to transfer from that board back to the City Board of Education of Ozark the administration and supervision of this particular high school, including the transfer of all of that school's property and equipment.

2. In my opinion, your second question must be answered in the negative.

Title 52, Section 352, Code of Alabama 1940, as amended by Act No. 806, General and Local Acts 1951, page 1408, describes the manner in which a teacher in the public schools may acquire a continuing service status, or so-called "tenure." It stipulates that, for a teacher to acquire tenure status, she must have served under contract as a teacher in the same county or city school system for three consecutive school years and shall thereafter be re-employed in such county or city school system the succeeding school year. Tenure, therefore, is acquired through service in a particular system and acquired tenure rights exist only in the system, county or city, in which they were acquired. That is to say, such rights are not transferable from one system to another. Should a teacher transfer from a system in which she holds a tenure status to a new system, she would not have tenure in the new system until she had taught in the new system the length of time required by Section 352, as amended, supra.

Title 52, Section 356, Code of Alabama 1940, enumerates the grounds for cancellation of a tenure teacher's employment contract. Included among the enumerated grounds is a "justifiable decrease in the number of teaching positions." Should a transfer of the high school in question, from county to city, result in a decrease in the number of teaching positions in the county system, and should there not be open other teaching positions in the county system to which the teachers might be transferred, it is my opinion that the teachers now teaching in the school would lose their tenure status in the county system. Since a transfer of the school from county to city would, in such case, result in a justifiable decrease in the number of teaching positions, the county board of education, could, in the manner

prescribed by Title 52, Section 357, Code of Alabama 1940, as amended by Act No. 690, General and Local Acts 1951, page 1191, proceed to cancel its employment contracts with the teachers affected by such a transfer.

For the reason that such a transfer could result in depriving many worthy teachers of tenure rights acquired by years of faithful public service to the county, I think it advisable to suggest that, should the two boards of education decide to effect such a transfer, the teachers adversely affected thereby could be assured of their continuing service status only by securing from the city a four-year contract. I take it for granted that the county would be vitally interested in protecting the tenure rights of its teachers, and that their security of employment would be an important detail concerning which adequate stipulations and provisions would be made before the county would agree to release its ownership and jurisdiction over the school.

3. In my opinion, your third question must be answered in the affirmative, subject to the limitation, however, that any agreement entered into by the present members of the county and city boards of education will not be binding on future members of those boards.

Title 52, Section 163, Code of Alabama 1940, provides as follows:

> "City and county boards of education shall have authority to reach agreements whereby children in the city may attend the schools in the county, and whereby the children in the county may attend the schools in the city, and they shall do so when the school in the city or in the county, as the case may be, is nearer to such pupils. In the event the said boards do not reach agreements for such attendance, the matter shall be referred by either board to the state superintendent of education who shall, after investigation, issue an order relative to same which shall be binding on both boards. Other non-resident pupils may be admitted on such terms as the board of education of the city may prescribe."

Section 163, supra, providing that school boards shall reach an agreement whereby children in the county may attend city schools, and, on failure to agree, the matter shall be referred to the State Superintendent of Education, is mandatory. **Board of Education v. State**, 222 Ala. 70, 131 So. 239.

Under Section 163, supra, city boards of education and county boards of education have full and complete authority to make agreements whereby children of the county can attend city schools and children of the city can attend county schools, and authority to decide what amount shall be paid for each child's attendance. Biennial Report of Attorney General, 1928-1930, page 41.

However, I am not of the opinion that, once such an agreement is reached and once the tuition fees are fixed, such agreement and fees must remain in force for all time. That is to say, members of the two boards have the authority and the duty of reaching such an agreement, but they

have no power to bind future boards or future board members in this respect. Changed conditions may require a changed agreement.

4. In my opinion, your fourth question cannot be answered categorically.

Title 52, Section 44, Code of Alabama 1940, in defining the duties of the state superintendent of education, in part provides that:

". . . . He shall decide, without expense to the parties concerned, all controversies and disputes involving the proper administration of the public school system. . . ."

Title 52, Section 47, Code of Alabama 1940, provides as follows:

"The state superintendent of education under rules and regulations promulgated by the state board of education, shall have the authority to review actions and orders of county and city boards of education and of county superintendents of education and city superintendents of schools in matters relating to finance and other matters seriously affecting the educational interest. Upon such review the state superintendent of education shall have the power to determine from the facts the just and proper disposition of the matter. The order of the state superintendent shall be binding."

However, Sections 44 and 47, supra, do not confer upon the state superintendent of education the duty to review any action of the county board except upon the appeal of one whose rights have been infringed or where more than the mere exercise of th county board's discretion is involved. Harman, Superintendent of Education, v. Ide, et al., 224 Ala. 414, 140 So. 418.

In my judgment, the transfer of the school in question is a matter primarily addressing itself to the sound judgment and discretion of the county and city boards of education, with due regard to the educational requirements of the two systems. I do not think that the state superintendent of education has the power or authority to force, or to overturn, a decision in this respect reached by the said boards, in whom is vested the responsibility for determining the strictly local educational necessities, unless the state superintendent of education finds that the transfer relates to finance, or seriously affects the educational interest.

Very truly yours,

SI GARRETT

Attorney General

December 30, 1952

Hon. C. C. Fountain

Mayor, City of Brewton

Brewton, Alabama

Constitutionality—Licenses—Municipalities—Taxation—

Newspapers—Radios.

1. A municipality may levy a privilege license against a local newspaper without violating the First Amendment, the Fourteenth Amendment, or the Commerce Clause (Article I, Section 8) of the United States Constitution.

2. A municipality may not levy a similar privilege license against a local radio station because of the Commerce Clause (Article I, Section 8) of the United States Constitution, unless the license specifically exempts interstate business.
Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of December 11, 1952, is as follows:

"The City of Brewton has as a part of its regular license schedule a license against the local newspaper in the amount of $35.00 and a license against the local radio station in the amount of $100.00. The owner of the local newspaper and the local radio station claims that this privilege license is unconstitutional.

"Will you please advise us whether or not a municipality has the right to license either a newspaper or a radio station?

"If your answer to this question is in the affirmative, will you please advise whether or not, in your opinion, a license in the amount as hereinabove stated is reasonable?"

In answering your inquiry, I shall divide this opinion into two sections —one concerning the licensing of the local newspaper, and the other concerning the licensing of the radio station. There is no question that the amount involved is reasonable. Furthermore, there is nothing to indicate that the license will be applied in a discriminatory manner either as to persons affected or as between intrastate and interstate commerce. Therefore, I shall not consider these questions.

I

The license on the newspaper appears to be valid.

Objections to the license are evidently posited on First Amendment or on Commerce Clause grounds. The First Amendment of the Federal Consti-

tutional guarantees freedom of speech and press. This guarantee is included in the due process clause of the Fourteenth Amendment of the Federal Constitution. **Grosjean v. American Press Company,** 297 U. S. 233. The Commerce Clause of the Federal Constitution (Art. 1, Section 8) prevents states from imposing undue burdens on interstate commerce.

At first blush, the **Grosjean** case, supra, would appear to be a bar to the instant license. There the Supreme Court invalidated on First Amendment grounds a Louisiana gross receipts tax imposed on newspapers of more than 20,000 circulation. The court made it clear that, "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government." (297 U. S. 250.) The Court continued:

> "The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. . . . ." (297 U. S. 250.)

In short, the Supreme Court in the **Grosjean** case invalidated the levy there involved because the levy had the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers. (297 U. S. 251.)

Later Supreme Court decisions indicate that the scope of the **Grosjean** case is not so broad as to outlaw licenses such as the one at hand. In **The Associated Press v. N. L. R. B.,** 301 U. S. 103, 132, 133, the court commented:

> "The publisher of a newspaper . . . must pay equitable and nondiscriminatory taxes on his business."

See also **Giragi v. Moore,** 301 U. S. 670; 49 Ariz. 74, 64 P. 2d 819. The Supreme Court recently reiterated this doctrine in **Breard v. Alexandria,** 341 U. S. 622.

Does the license, then, run afoul of the Commerce Clause? Without considering what interstate aspects the instant newspaper possesses, because of insufficient information on this point, it can safely be held that the license will not violate the Commerce Clause. The leading Supreme Court case would appear to be **Western Live Stock v. Bureau of Revenue,** 303 U. S. 250, where a gross receipts tax on advertising sales was upheld even though some copies of the magazine containing advertisements were distributed interstate. The business of publishing a newspaper would seem sufficiently local to authorize licensing the privilege of engaging in that activity. Cf. **Memphis Natural Gas Co. v. Stone,** 335 U. S. 80; **Interstate Oil Pipe Line Co. v. Stone,** 337 U. S. 662; **Coverdale v. Arkansas-Louisiana Pipe Line Co.,** 303 U. S. 604; **Utah Power and Light Co. v. Pfost,** 286 U. S. 165, **McGoldrick v. Berwind-White Co.,** 309 U. S. 33.

A recent South Dakota case, **Mitchell Publishing Co. v. Wilder**, 52 N. W. 2d 732, concluded that a license tax on a newspaper violated the Commerce Clause. That court based its decision on the United States Supreme Court case of **Lorain Journal Co. v. United States**, 342 U. S. 143, which held that the newspaper there involved had sufficient interstate connections so as to come within the Sherman Anti-trust Act. But the conclusion of the South Dakota case is not dictated by the **Lorain Journal Co.** case. Indeed, the South Dakota case appears contrary to the **Western Live Stock** case.

Therefore, for the reasons set out above the City of Brewton may impose the license tax on the local newspaper.

II

As it now stands, the license against the local radio station violates the Commerce Clause of the Federal Constitution. (So far as First Amendment arguments are concerned, Section 1 statements are equally applicable to the radio stations.) As I shall point out below, however, the ordinance may be so worded as to avoid the constitutional objections.

The leading United States Supreme Court case is **Fisher's Blend Station v. Tax Commission**, 297 U. S. 650, holding that a Washington gross receipts tax on radio broadcasting stations, unapportioned, violated the Commerce Clause. In so holding the court did not decide "whether the state could tax the generation of such (radio) energy, or other local activity of appellant, as distinguished from the gross income derived from its business." (297 U. S. 656.)

It is important to understand that communication and transportation have received rigorous protection from the Supreme Court. See **Cooney v. Mountain States Tel. Co.**, 294 U. S. 384. And though, from a standpoint of economics, the radio station may seem close to the **Western Live Stock** situation, apparently a distinction will be drawn in which a radio station is assimilated to a carrier, as are telephone and telegraph transmitters. See discussion in Powell, **More Ado About Gross Receipts Taxes**, 60 Harv. L. Rev. 501, 516.

The decisions of lower Federal courts and state courts also would invalidate the instant license on radios. See the collation of cases in 11 A. L. R. 2d 986-990. The Alabama case of **Dorsky v. Brown**, 255 Ala. 238, 51 So. 2d 360, cert. den. 342 U. S. 818, upholding a license imposed on coin operated radios in hotels is close to the instant situation. But, there the business is much more clearly local than is the radio station. And, furthermore, a flat levy on the business of radio broadcasting, without any exception for interstate business, flies in the face of the **Fisher's Blend** case.

An addition to the instant license, excepting from the licensing provisions the doing of interstate business, might save the ordinance. In **Beard v. Vinsonhaler**, 215 Ark. 289, 221 S. W. 2d 3, the ordinance involved imposed an occupation tax on the business of radio broadcasting. But the law recited that it shall not apply "to that portion of the business that may be in interstate or foreign commerce, or to business done for the

government of the United States." The Arkansas Supreme Court upheld the levy and the United States Supreme Court dismissed an appeal for want of a substantial federal question. (338 U. S. 863.) The United States Supreme Court cited in its memorandum opinion **Crutcher v. Kentucky,** 141 U. S. 47. There the court held void on commerce clause grounds a license tax imposed on an express company. The court commented, however: "But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection." (141 U. S. 59.) Apparently in dismissing the appeal in the **Beard** case, supra, the Supreme Court had in mind this sentence from the **Crutcher** case.

In summary, the license on the newspaper activity appears good; license on the radio broadcasting activity appears bad, unless a qualifying exemption, such as the one described above, is included in the ordinance.

Very truly yours,

SI GARRETT

Attorney General

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